2008

Alan V. Pitt v. Alice M. Taron, Robert Taron, Sherri Kuester and Ralph Brown, Lowell D. Shields and Janice C. Shields, Ray H. Dewsnup and Sally A. Dewsnup, Larry Dewsnup : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

ALAN V. PITT Plaintiff and Appellant, Vs. ALICE M. TARON AND ROBERT TARON, SHERRI KUESTER AND RALPH BROWN, LOWELL D. SHIELDS AND JANICE C. SHIELDS, RAY H. DEWSNUP AND SALLY A. DEWSNUP, LARRY DEWSNUP AND REBEKAH DEWSNUP, AND ALL PERSONS UNKNOWN CLAIMING ANY INTEREST Defendants and Appellees.	**Appellate Court No20080380-CA** **Trial Court No. 060300772**

BRIEF OF APPELLANT

This is an appeal from the final judgment and order concerning a Quiet Title ruling issued by the Honorable Mark S. Kouris., Third Judicial District Court, in and for Tooele County, Utah, entered in this matter on June 26, 2008.

The parties involved in the appeal are Alan V. Pitt, the Plaintiff and Appellant and Robert Taron, Ray H. Dewsnup and Sally A. Dewsnup, the Defendants and Appellees.

Sherri Kuester, Ralph Brown, Lowell D. Shields, Janice C. Shields, Larry Dewsnup, Rebekah Dewsnup, and all Persons Unknown Claiming any Interest, as the remaining defendants at trial are not involved with this appeal.

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LIST OF ALL PARTIES

ALAN V. PITT, Plaintiff and Appellant,

ALICE M. TARON - Deceased

ROBERT TARON, Defendant and Appellee

SHERRI KUESTER – Dismissed

RALPH BROWN – Judgment entered – not appealed

LOWELL D. SHIELDS – Judgment entered – not appealed

JANICE C. SHIELDS – Dismissed

RAY H. DEWSNUP, *Defendant and Appellee*

SALLY A. DEWSNUP, Defendant and Appellee

LARRY DEWSNUP – Dismissed

REBEKAH DEWSNUP– Dismissed

ALL PERSONS UNKNOWN CLAIMING ANY INTEREST – Dismissed

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann §78A-3-102 and §78A-4-103 which placed the matter before the Supreme Court of the State of Utah, and the Order dated May 6, 2008 which transferred the matter from the Utah Supreme Court to the Utah Court of Appeals for disposition pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure as of May 26, 2008.

STATEMENT OF THE ISSUES and STANDARD OF REVIEW

ISSUE ONE: Did the trial court abuse its discretion and enter findings that were clearly erroneous when it entered a ruling against the Appellant concerning his claim to own the lands to his west and to his east via the doctrine of boundary by acquiescence, when the court disregarded photographic evidence and concentrated almost exclusively upon conflicting testimony about the existence of fence lines to establish the boundary between properties and the long term acquiescence of the adjacent land owners to said boundaries?

Standard of review: A trial court's determination that " a given set of facts gives rise to a determination of acquiescence . . . is reviewable as a matter of law" *Wilkinson Family Farm, LLC v. Babcock, 1999 UT App 366*, P6, 993 P.2d 229. However, when the "determination is highly fact sensitive we grant the trial court some measure of discretion." Id. The appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are ... clearly erroneous.'" *Orton. v. Carter*, 970 P.2d 1254, 1256 (Utah 1998) (quoting *State v. Irizarry*, 945 P.2d 676, 678 (Utah 1997)). A district court's conclusion that a given set of facts gives rise to a determination of acquiescence is reviewable as a matter of law. *RHN Corp. v. Veibell,* 2004 UT 60, P22, 96 P.3d 935. The appellate court will review the trial court's conclusions of law "for correctness, according the trial court no particular deference." *Orton,* 970 P.2d at 1256.

Determinative law: The party seeking to establish boundary by acquiescence must prove (i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by

adjoining landowners.'" *RHN Corp. v.* Veibell, 2004 UT 60, P22, 96 P.3d 935. at P23 (quoting *Jacobs v. Hafen,* 917 P.2d 1078, 1080 (Utah 1996)).

ISSUE TWO: Did the court make findings that were clearly erroneous when it entered a ruling against the Appellant concerning his claim to have perfected an easement to egress across the neighbor's land to his east via the prescriptive easement doctrine based in part upon testimony by the Appellee Sally Dewsnup about her mother having been fearful of the appellant because of his previous drug related conviction, when the court considered the appellant had a possible access over his own property after overruling repeated objections on the issue, and when the court stated that the appellant had lost whatever claim to the easement he may have had when he was incarcerated for a period of one year beginning in 2003 due to a drug related offence. Standard of review: "'The appellate court 'will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous.'" *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998) (quoting *State v. Irizarry*, 945 P.2d 676, 678 (Utah 1997)). The appellate court will review the trial court's conclusions of law "for correctness, according the trial court no particular deference." Orton, 970 P.2d at 1256. Determinative law: The party seeking to establish a prescriptive easement must show that the use was open, notorious, continuous and adverse for more than 20 years. *Marchant v. Park City*, 771 P.2d 677, 1989, 104 Utah Adv. 23 (Utah Ct. App. 1989).

ISSUE THREE: Did the trial court deny the plaintiff a fair trial and access to an open court when it terminated the examination of the Appellee Robert Taron before plaintiff's counsel was allowed to ask any questions concerning the actual acreage of the parcels as divided by the fence, about the historical building

placement in relation to the boundary verses the fence and to ask questions about previous agricultural use of the Taron land to include the use as an orchard, for the irrigation and production of alfalfa, and the holding and feeding of livestock on the land in years past?

Standard of review: The appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are ... clearly erroneous.'" *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

Determinative law: Utah Constitution Art. I; Section 11, Courts shall be open, which entails the ability of counsel to fully develop their respective case through the questioning of witnesses presented at trial. "Because the one of the parties was effectively precluded from calling the witness under a restriction imposed by the trial court, there was substantial and prejudicial error, therefore it was necessary that the judgment be reversed and the case remanded." *Board of Educ. v. Barton, 617 P.2d 347, 347(Utah 1980)*

CONSTITUTIONAL PROVISIONS

Utah Constitution Art. I; Section 11, [Courts open -Redress of injuries]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall- have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred` from prosecuting or defending before any tribunal in this State, by himself. or counsel, any civil cause to which he is a party. 1896

STATEMENT OF THE CASE
TO INCLUDE RELEVANT FACTS

On April 12, 2001, the Tooele County surveyor completed a dependant resurvey of the immediate area surrounding the lands that are the subject of this action. It is common knowledge throughout the Pine Canyon and Tooele area that the dependant resurvey caused various degrees of misalignment between the existing fence lines and the recorded deeds as the new monuments locate the old deed descriptions differently upon the land.

The layout of the Appellant Alan Pitt's property and fences remained unchallenged from 1952 until 2006 when the first known private survey of the properties was conducted. See defendant's exhibit #1. When the Appellee, Robert Taron began to tear down the north west portion of Pitt's fence citing to the new private survey, Pitt contacted a different surveyor to establish precisely where the fences were in relation to the deed lines because the first survey used by Taron did not contain this information. The product of the second survey was presented at trial as plaintiff's exhibit #1.

This quiet title action was initiated by Alan Pitt when Robert Taron began to tear down Pitt's existing fences (Tr. 291 Line 10-13) on the north end of Pitt's west boundary in an attempt to relocate the boundary line to match a new survey (Tr. 59 Line 5-9), and when the Appellees Sally and Ray Dewsnup, who acquired their property in 2005, began the construction of a home that would displace the roadway Pitt and his family had openly used to access his barnyard for the past 56 years. (Tr. 130 Line 7-9, Tr. 132 Line 4, Tr. 133 Line 1 –10) See exhibit #27. After this litigation began, the Dewsnups

placed large boulders (Tr. 297 Line 13–14) in the roadway Pitt and his family had used for so many years. (Tr. 372 Line 18-23)

The neighbors to the west and east of Pitt each claimed their actions to change the status quo were justified because of the deed lines shown on the recently completed survey. (Tr. 290 Line 13 -25).

CONDUCT OF TRIAL

Trial was held on April 9 and 10, 2008 before the Honorable Judge Mark S. Kouris. Over the two days, testimony was given by Alan Pitt, his brothers Robert Craig Pitt and Johnny Pitt, the defendants Lowell Shields, Ralph Brown, Sally Dewsnup, Larry Dewsnup, Rebecca Dewsnup, Robert Taron and various children and neighbors of the of the defendants to include Vicky Hildebrand, Michael Taron, Holly Shields, and Sharon Caldwell.

At the conclusion of the trial, the court took the matter under advisement until it announced its ruling on April 14, 2008 wherein it granted Alan Pitt quiet title to the land on the north boundary of his property as requested and it granted him judgment against Lowell Shields as requested. However, the court denied Pitt's claims to the land to his west and to his east via the doctrine of boundary by acquiescence and it denied his claim of a prescriptive easement across the land to his east owned by Sally and Ray Dewsnup.

The denial of these two claims and Alan Pitt's belief that he was not given a fair and impartial hearing resulted in this appeal concerning the two negative rulings.

At trial, the plaintiff presented testimony supported by more than 20 photographs dating from 1952, through the 1960's, through the 1970's and the 1980's up to and

including the present, all showing a visible line marked by fences and buildings existing along the west side of his property, yet the trial Court apparently ignored all of this photographic evidence and instead considered only the testimony of the defendant's several witnesses when it ruled that it had not been demonstrated by a preponderance of the evidence that the landowners occupied the land up to a visible line for a complete period of 20 years. (Tr. 367 Line 14-17)

Alan Pitt also felt that he had been denied a fair trial because rather than defend the action based solely upon the existence of the factors related to boundary by acquiescence and prescriptive easements, or the lack thereof, the defendants attacked his personal history and his motivation in bringing this action and were openly allowed to do so by the court.

Alan Pitt testified that he had filed this action because the neighbors were trying to move the property lines from where they had been all of his life, (Tr. 59 Line 5), not as the *"calculated actions of a man who is trying to con his neighbors out of land"* as stated by the defendant's counsel in his opening. (Tr. 19 Line 18-19) However, the defendant's counsel continued to personalize this action and the court freely allowed it as exampled on several occasions such as when counsel immediately began his cross examination of Alan Pitt with demands for admissions about Mr. Pitt's prior criminal convictions. (Tr. 138 Line 13 – Tr. 140 Line 22)

The fact of the plaintiff's prior felony conviction was never used to try to impeach the witness' veracity, but rather was used exclusively to vilify the plaintiff, as were the unsupported questions to Pitt about violating his parole. This personal attack was continued throughout the defendant's case when such issues as a fire in a car not

caused by Pitt were introduced by the defendant's counsel with leading questions to his client eliciting hearsay testimony about what her long deceased mother Margaret Shields had said like "*Was she aware of the car bomb that had gone off on your property?*" and "*was she aware of his drug activity?*" (Tr. 301 Line 7 –18) which elicited the response from Sally Dewsnup that the incident had indeed intimidated her mother. (Tr. 310 Line 4-16)

It was obvious from the trial court's questions and statements during closings that even though the witness Sally testified that her mother was not afraid of Alan Pitt, (Tr. 301 Line 12) these personal attacks against Alan had an improper and yet great impact upon the court's ultimate ruling concerning property rights.

For example, in closing arguments, the court asked " *What happens if I want to stop you but I'm afraid* ***maybe you're a drug addict*** *and you have some people in the underworld that I'm scared to death to do it. I've ask you several times to do it; how far do I have to go?"* (Tr. 345 Line 23 –Tr. 346 Line 2).

The Court appeared to display its bias against the plaintiff on several other occasions. For example, Pitt tried to establish the acreage windfall coming to Taron via testimony by Robert Taron, but was not allowed to do so by the trial judge. Also during the testimony of Robert Taron, the court overruled the plaintiff's "requires a legal conclusion" objection when the defendant's attorney ask Mr. Taron "*You would have had up to 20 years to change your mind or to discovery the truth and tear down that fence; is that correct*?" To which Mr. Taron was allowed to answer "Yes." However, when the plaintiff's attorney asked if the fence had existed 20 years before he purchased the land would he be bound by the 20 year period, the court instructed Mr.

Taron that he could just say "*you don't know.*" Mr. Taron immediately provided the court's suggested testimony, at which time the court immediately terminated the re-cross examination and dismissed the witness. (Tr. 293 Line 5 – 294 Line 7)

Prior to the dismissal of Mr. Taron as a witness, the trial judge arbitrarily terminated the cross examination of this key defendant because of an artificial time constraint created in response to the scheduled use of the court room by the Court of Appeals on April 11, 2008. (Tr. 135, Line 12-16)

Although many cross examination questions had been planned for the very evasive witness Robert Taron concerning the historical use of the Taron land for agricultural purposes to include the raising of live stock, the historical irrigation of hay on the land and the cultivation of an orchard over time and several questions concerning the long standing placement of buildings and tree lines as depicted in photographs the defense had just offered as exhibits, Pitt's attorney was, without warning, told by the Court that "*You've got, Mr. Buhler, five more minutes*" (Tr. 287 Line 15 –18), and then about five minutes later was forbidden from completing his cross examination of the witness Robert Taron when the Court interrupted Buhler in mid-question by saying "*Mr. Tanner, do you have any questions? Your time is up Mr. Buhler.*" (Tr. 291 Line 19-22)

This termination of the cross examination of the crucial witness on the key issues of the case against him, was extremely upsetting to Alan Pitt. It was even more upsetting when the ruling was announced that he had failed to prove these exact issues.

HISTORY OF THE WESTERN BOUNDARY (FENCE)

Alan Pitt's father and mother received title to the Pitt land from the neighboring and closely related Shields family in February 1952. At the time of this transfer, the Shields and the Pitts relied on the placement of the then existing "old Harris fence" on the west side of what became the Pitt property to measure out the eighty feet from west to east described in the Pitt's deed and to establish the eastern boundary of the Pitt's property. According to Robert Taron, the "old Harris fence that's been there for years that was an eastern boundary of the eastern strip (the subject land). (Tr. 274 Line 5-12)

A fence line was constructed about 80 feet east from the existing westerly fence along a portion of the eastern boundary of the Pitt property in order to separate it from the remaining Shields property. (Tr. 305 Line 16-18)

Johnny Pitt, who at the time of trial was 56 years old, testified that after the Pitts purchased the land in 1952, his father, with his own hands, constructed the home that Alan and his mother live in today. (Tr. 46 Line 6-8) Johnny stated that when his father built the Pitt home in the 1950's and throughout his childhood the fence seen in plaintiff's exhibits #5 and 6 (photos of Johnny ages 6 and 12 {dated on photo as March 1963}) was always clearly visible, was used to mark the common boundary and was the only boundary recognized by the Pitts and by Bill and Jim Harris (Taron's predecessors). (Tr. 41 Line 20-25, Tr. 42 Line 1-20)

Johnny testified that the fence began at the front (south end) of the Taron property and extended all the way down the east side of the Taron property to a point north of the [hay] barn which included the entire west side of the Pitt property (Tr. 42 Line 6-20). Johnny also testified that Mr. Harris never objected to the placement of the

fence (Tr. 45 page 8-18) where it is shown to be on the plaintiff's exhibit #1 and on the defendant's exhibit #1.

Johnny stated that the fence had been located as the boundary between the Harris and Pitt property since the 1950's when the Harris land was being used for an orchard (Tr. 41 Line 20-25) and he as a child stood upon it to get plums from across the fence. (Tr. 45 Line 8-10, See Plaintiff's Exhibit #5) He stated that the fence existing today is in the very same location as was the fence that was there in 1952. (Tr. 46 Line 18-22)

Johnny testified the fence had been constructed of field fencing and wooden posts which were broken off by animal activity and replaced over time in the same historical location a few feet west of the trees that his father had planted in the late 1950's along the west side of the house. (Tr. 49 Line 3-14) His father also planted trees along the south and east sides of the house and yard that remain in place today. See Exhibit #27and 29.

These trees, as seen in plaintiff's exhibit #6, were several years old by March 1963 and are seen to be located about 4 feet west of the same field wire fence that was present in the 6 year older photo of Johnny (exhibit #5). These trees are seen again in plaintiff's exhibit #9 which is a photo from the mid 1970's by which time the fence, although still existing, was already very old and had been patched with pallets. (Tr. 65 Line 13). These trees still exist today as seen in plaintiff's exhibit #15 where they are still located about 4 feet west of the still present fence line.

Alan Pitt testified that the fence to the west of his home has been located in the same location since his parents bought the land through today and identified the same

fence line in various photos from different periods, the first being plaintiff's exhibit #7 which showed the fence as a visible boundary existing in 1974 between the Pitt property and the Harris plum orchard. (Tr. 60 Line 3-5) Alan testified that the bottom photo on exhibit #7 establishes that the southern portion of the fence to the west of his home had been located in the same location in the 1960's as it was in the 1950's and as is today and that the Harris family had built the subject fence, not the Pitt family well prior to the early 1950's. (Tr. 65 Line 1) Alan's testimony about exhibit #9 established that the fence to the west of his home and several feet west of the tree line on his property was already very old and had been patched with pallets by the mid 1970's. (Tr. 65 Line 13)

Alan testified that exhibit #10 which was taken in the mid 1970's (see annex #1 for better copy than the court exhibit) showed the obvious and clearly existing fence line on the majority of the northern portion of the west side of his property before the now existing grain bin and the Pitt hay barn were placed on the property. (Tr. 66 Line 23 - Tr.67 Line 8)

Alan testified that his exhibit #12 showed the obvious and clearly existing fence line consisting of wood posts sunk into the ground and hung with field wire on the west side of his property and east of the still existing log cabin located on the Taron property. Also shown is the north west corner of the Pitt property clearly marked with a wooden fence existing during the early 1970's before the now existing grain bin and the Pitt hay barn were placed on the property by his father. (Tr. 69 Line1-25 Tr.70 Line 21)

Alan testified that he, his brother and the defendant Robert Taron had replaced the fence shown in the above mentioned exhibits with the now existing fence in the exact same location using a string line. (Tr. 73 Line 9-11)

As shown in exhibits #6 {March 1963}, 14, 15, and 16, {2005 –2006} Alan described the line of trees his father had planted about 4 feet east of the historical fence line in the late 1950's as they appeared in 1963 and the 2005 – 2007 time frame. In so doing, Alan confirmed that the trees were located directly on top of what was determined by the 2006 survey to be the recorded deed line, but about 4 feet east of the historical and still existing fence line. (Tr. 75 Line 4-10)

Alan described the placement of a shed and a grain bin on the west side of his property very near the fence line as shown in exhibits #17 and 18, stating that his father had been given the grain bin by the Harris estate which would necessarily have been after the photo marked as exhibit #10 was taken in the mid 1970's.

Alan described the placement of the grain bin on the west side of his property very near the fence line directly across the fence from the "old log cabin" on the Taron property as shown in the top photo on exhibit #20 and described the visible stake as being the surveyor's point marker of the northwest corner of the deeded property being located well within the old fence line and in exact concert with the survey plats offered as plaintiff's exhibit #1 and defendants' exhibit #1. (Tr. 81 Line 13 Tr. 82 line 14)

Robert Craig Pitt testified that he remembered the historical fence line extending about one mile north to south between the Pitt and Taron property as he climbed over it almost daily for the seven years when he worked for the Harris family between 1967 and 1973. (Tr. 52 Line 6-16)

Craig also testified that to his personal knowledge, for at least the previous 40 years before 2005, the Harris family and the Pitt family had accepted the fence as the boundary between their respective properties.

Craig testified that around 1995, he, Alan, and Robert Taron replaced the historical fence which separated the Taron and Pitt property that had been in place since well before 1952, by placing the new fence in the "exact same place" as the old fence. (Tr. 53, Line 25) Craig testified that defendant Robert Taron not only helped rebuild the fence in its historical location, but that Taron knew where the old fence was before it was replaced. (Tr. 55, Line 2-3)

Robert Taron confirmed that he helped construct the replacement fence without complaint. (Tr. 263 Line 15-22) Robert Taron also confirmed that "Up to '74 or '75 (May 1975), because of the sheep operation, there was fencing between the Pitt property and the Taron property. (Tr. 265 Line 12-19) Robert Taron stated that between 1975 and 1987, the Taron land laid idle except for the use by Pitts to raise livestock. (Tr. 265 Line 20-24)

Most important of all of the statements made at trial by Robert Taron was when asked directly if he was surrendering any claim he has to the land that is on the Pitt's side of the fence, He stated ***"YES,*** because you know, the thing of it is, in my recorded deed I have 87, the distance of my property is 87.12[feet]". (Tr. 268 Line 8-13) Although immediately upon this admission by the defendant, the defendant's attorney interrupted the cross examination to state his client was hard of hearing, this admission was never recanted. (Tr. 268 Line 8-18)

Mr. Taron went on to say he was claiming the land on his west side all the way to the west fence even though his survey showed his deed line to be east of his western fence line by the same approximate amount as the Pitt deed line was to the west of the Pitt fence line. (Tr.269 Line 5-25) Before Pitt's attorney could establish that if Pitt's claim was granted, Taron would still have all of the acreage described in his deed, the court interrupted the examination stating it was irrelevant. (Tr. 270 Line 8)

Upon an exhibit by exhibit examination, Robert Taron denied any personal knowledge of the existence of, or the lack of existence of the subject fence line as shown in the plaintiff's exhibits 6, 9, 12, 13, 14, 18, etc. (Tr. 276 – Tr. 286)

Robert Taron also testified that to his knowledge, in the 1960's and early 70's the land was used by his predecessors each winter and early spring for a "central hub for sheep farming" whereby they kept and fed 1,000 – 2000 sheep on the land. (Tr. 246 Line 14 –15)

Mike Taron, the son of Robert Taron, testified that he lived on the Taron property for two years beginning in 1987. (Tr. 110 Line 5-7) He stated that when he was 6 or 7 years old [1978 1979] there was a section of fence for sure from the front of the property to the north edge of the [Pitt] house. (Tr. 111 Line 2-20) He also testified that from the house back, there was never a permanent fence but only pallets. (Tr. 111 Line 2-8) He said in 1987 he was employed by his father to keep the sheep out of the ditches and prevent them from walking on the pipes, etc. He also testified of having to notify law enforcement for assistance in controlling this livestock. (Tr. 367 Line 7-14)

Holly Shields, the daughter of Robert Taron, testified extensively about being able to run and play in open hay fields with the only fences she ever remembered since

she was three years old in 1969, being only temporary and used only to keep the sheep in. (TR. 200 Line 11-19) She specifically stated that " *There was nothing ever, a permanent fixture put up there until after my dad purchased it . . . in 1987.*" (Tr. 202 Line 9-18) On cross examination, although Holly Shields testified specifically that when she was a child in the late 1960's and the early 1970's there was no permanent fence to the west of the front of the Pitts home (Tr. 212 Line 10-20) and that she had no memory of any permanent fences, only temporary fences, when asked directly about the fence shown in plaintiff's exhibit # 9 she said it too was a temporary fence that changed over time just as all of the Pitt fences were. (Tr. 212 Line 10-22)

Sharon Caldwell testified that she had been to the Taron property 20 – 30 times since the late 1970's and "*never saw a fence line there.*" (Tr. 220 Line 6) However, on cross she also testified that she had seen a trailer home in the middle of the Taron property (Tr. 221 Line 10-11), and that she had no idea where the boundary between the Pitt's property and the Taron property was located. (Tr. 220 Line 24-25) When asked when was the first time she had been to the Taron's property Sharon Caldwell testified it was the "*last of the 80's I guess.*" (Tr. 222 Line 1) She also testified on cross that she never saw any fence where the fence shown in plaintiff's exhibit #9 had been located since 1952, (Tr. 222 Line 13-25) and that she never saw any fence where the fence shown in plaintiff's exhibit #12 was located. (Tr. 223 Line 3-4)

HISTORY OF THE PRESCRIPTIVE EASEMENT

Alan Pitt testified that "*from the '60's all the way through the '90's up to today,*" his family had been driving across the Dewsnup property and accessing their barnyard by going through the gate located on the east side of his property located north of

where the trees and satellite dish are now located as shown in plaintiff's exhibit #26. (Tr. 94 Line 3-10) Alan stated that exhibit #24 showed the Pitt family use of the Dewsnup land to access their barnyard through the gate around 1981. (Tr. 89 Line 4-13)

Alan stated that both he and mostly his brother Craig used the barnyard access across the Dewsnup land to access and feed Craig's sheep. (Tr.151 Line 10-13) When asked how often and how long he had used the access, Alan stated that there was never any agreement with the Shields (Tr. 154 Line 1 –3), but that his family had used the land for access "*All my life we've used that.*" (Tr. 152 Line 15-20)

When shown plaintiff's exhibit #25, and asked how he came to park his Blazer on the Dewsnup land, he stated that "*it was Margaret's at the time*" and "*I just parked there because we did not have enough room in our driveway so I 'd always parked there and I drove around there to get into our back yard.*" (Tr. 90 L13 – Tr. 91 Line 6)

When asked if he had ever received permission from anyone to drive over the Dewsnup land to access his back yard from the '60's through the '90's, Alan stated "*no we just always used it.*" (Tr.95 Line 3-9)

Alan stated that, Margaret Shields, the predecessor land owner to the Dewsnups, knew of the Pitt's open use of the land (Tr. 130 Line 4-14) for *"a lot more than 20 years,"* (Tr. 133 Line 8), but did not complain to him about it or take any physical action to stop his use and no one else did either, until Sally Dewsnup started to build her new house in 2005. Sally Dewsnup confirmed that the Pitts and Margaret Shields followed by the Dewsnups never had any agreement to allow Pitts to cross the land. (Tr. 300 Line 20-22)

Alan testified that when the Dewsnup's predecessor Margaret Shields owned the land, she was aware of his use and that she never complained when Alan replaced a gate post that was located on her land that held up the gate the Pitt's used to close in their barnyard. (Tr. 97, Line 20 – Tr. 98 Line 8)

Alan also testified that members of the Shields family had over time used his driveway to access the area behind Margaret's house and the two neighboring families had used the adjoining properties as a joint driveway for the last 50 years. (Tr. 178 Line 17-25 – Tr. 179 Line 2) No other witness offered any testimony to dispute this claim.

Alan stated that after this law suit started, that as a self help exclusion, to obstruct his passage into his back yard, the Dewsnups placed boulders in the pathway he had always used as seen in plaintiff's exhibit #30. (Tr. 99 Line 3-15) Alan used the access by driving between the second and third tree and then down the Dewsnup's land on the east side of the trees and the satellite dish as seen in plaintiff's exhibit #29. He also stated that he had used his tractor to move the boulders so that he could access his barnyard to feed his brother's sheep. (Tr. 100 Line 2-4)

The defendant's attorney directly asked Alan Pitt if he could use his driveway to access the back yard and he stated "*No. There's trees down there. A satellite dish down there. There's all kinds of obstacles.*" (Tr. 161 Line 21 – Tr. 162 Line 2) The defendant's attorney asked more than one defendant if they thought the Pitts could drive on their own land instead of the Dewsnup's land and each time Pitt's attorney objected because that was not one of the factors germane to prescriptive easement and each time, the court overruled the objection, finally explaining that under the theory

of easement by necessity it could be relevant information. (Tr. 308 Line 10 – Tr. 309 Line 1-18)

When asked if there were chunks of time when Alan did not drive over the land due to his incarceration, he stated that his brother Craig had used the access for his sheep during the year Alan was gone. (Tr. 166 Line 10-17) Craig Pitt testified that in 1995 that he rebuilt the fence to keep his sheep in the Pitt barnyard thus establishing his use of the land for raising sheep. (Tr. 54 Line 5-15) Craig Pitt also testified that Lowell Shields and his father Don Pitt had made an agreement that Shields *"would give us that right-of-way as part of our property because of something my father had give him."* (Tr. 57 Line 3-11)

Larry Dewsnup, the son of Sally Dewsnup, when asked of his knowledge any action by the defendants' family to stop the Pitt's from crossing the subject land testified that over the last 35 years, other than his mother placing the boulders in the Pitt's way, he had no knowledge of any action taken by his family to stop the Pitt's use of their land. (Tr. 229 Line 9-14) He did say his grandfather stopped the construction of a fence so it would not block the Pitt's use but he had no personal knowledge of any permission for the Pitt's to use the land being given by any member of his family (Tr.227 Line 9-12), not by his father (Tr. 230 Line 24 - Tr. 231 Line 2)

Rebecca Dewsnup was called as a witness, but stated she had no personal knowledge about the subject land prior to 1994. (Tr. 237 Line 17-19)

The defendant Sally Dewsnup testified that she and her husband built a new house on the subject land and moved in as the Pitt's neighbors in 2006. (Tr. 295 Line 17-18) She also stated that she had asked Alan Pitt not to drive over her land several

times (Tr. 296 Line 21-24) but that Craig Pitt kept driving across the land to feed his sheep (Tr. 298 Line 3-10). Sally admitted that when her mother lived there, the Pitts often and repeatedly parked farm equipment on her land (Tr. 297 Line 1-7 and Tr. 309 Line 23 – Tr. 310 Line 3)

Alan Pitt (Tr. 182 Line 22-25) and Sally Dewsnup both testified that the Dewsnups chose to place the new house where it is was very close to the historical access use of the land (Tr. 316 Line 6-15) The placement of the home as shown in plaintiff's exhibit #27 was within 13 feet of the Pitt driveway, leaving very little room to the west of the home.

SUMMARY OF ARGUMENT

The trial court ruled that the Appellant's claim to own certain land within his fence line via the doctrine of boundary by acquiescence was denied and ruled that his claim of a prescriptive easement across his other neighbor's property was also denied.

The Appellant believes the trial court abused its discretion and made a clearly erroneous rulings on these two issues when it disregarded unchallenged testimony and volumes of undisputed photographic evidence supporting his claims of ownership and easement.

The Appellant believes the trial court not only wrongly accepted evidence of the plaintiff's past criminal history but improperly considered that evidence in determining that his rights to real property were to be denied on an equitable basis favoring his neighbors.

ARGUMENT

QUIET TITLE TO TARON'S LAND:

The first issue on appeal is the ruling that Alan Pitt's claim to the disputed land on his western boundary via the doctrine of boundary by acquiescence was denied.

Boundary by acquiescence is a long standing doctrine in Utah. See *Holmes v. Judge*, 31,Utah 269, (1906) During its ruling, the trial court correctly identified the claim Pitt was making concerning the property west of his deeded property line and east of his fence line on a theory of boundary by acquiescence, when it announced that to prevail Pitt must prove by a preponderance of the evidence that (1) the parties occupied up to a visible line marked by monuments, fences or buildings; (2) parties have mutually acquiesced to the line as a boundary; (3) this happened for 20 years; and (4) they are adjoining landowners. (Tr. 366 Line 1-10) See *Orton v. Carter*, 970 P.2d 1254, (Utah 1998) (quoting *Jacobs v. Hafen,* 917 P.2d 1078, 1080 (Utah 1996)).

In the case of *RHN Corp. v. Veibell,* the Utah Supreme Court summarized very concisely the law as it pertains to this issue when it stated:

> Under the doctrine of boundary by acquiescence, the party attempting to establish a particular line as the boundary between properties must establish that the parties mutually acquiesced in the line as separating the properties." *Ault v. Holden, 2002 UT 33, P18, 44 P.3d 781.* To acquiesce means to "recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property." Id. Acquiescence is a "highly fact-dependent question," see *Orton, 970 P.2d at 1256*, and "acquiescence, or recognition, may be tacit and inferred from evidence, i.e., the landowner's actions with respect to a particular line may evidence the landowner impliedly consents, or acquiesces, in that line as the demarcation between the properties." *Ault, 2002 UT 33 at P18.* Courts have

looked at various landowner actions as evidence of acquiescence in a visible line as a boundary. Occupation up to, but never over, the line is evidence of acquiescence. See *Staker v. Ainsworth, 785 P.2d 417, 420-21 (Utah 1990)* (weighing the fact that "owners occupied houses, constructed buildings, farmed, irrigated, and raised livestock only within their respective fenced areas" (emphasis added)); Richard R. Powell & Michael Allen Rohan, 9 *Powell on Real Property § 68.05* [6][d] (2004) (noting that "'cultivating up to, but never over, a line'" is evidence of acquiescence (quoting *Knutson v. Jensen, 440 N.W.2d 260, 263 (N.D. 1989))*. However, occupation by itself may in some cases be insufficient to establish acquiescence. See *Hales v. Frakes, 600 P.2d 556, 559 (Utah 1979)* ("Plaintiff's occupation to the fence without interference was not sufficient to establish defendant's acquiescence in the fence as a boundary."). Acquiescence may also be shown by silence, or the failure of a party to object to a line as a boundary. See *Judd Family Ltd. P'ship v. Hutchings, 797 P.2d 1088, 1090 (Utah 1990)* (weighing the fact that "not once did Judd then suggest or imply that the fence was not in the proper location"); *Staker, 785 P.2d at 420-21* (weighing the fact that "there [was] no indication in the record that any predecessor in interest behaved in a fashion inconsistent with the belief that the fence line was the boundary" and that "there [was] no indication that any landowner ever notified his neighbor of a disagreement over the true boundary "in finding mutual acquiescence); *Mason v. Loveless, 2001 UT App 145, P20, 24 P.3d 997* ("Our settled case law . . . clearly provides that acquiescence may be established by silence.").

Veibell's occupancy and possession for a long period of time "ripened into a legal title" long before he discovered the actual location of the record boundary. *Brown v. Peterson Dev. Co., 622 P.2d 1175, 1177-78 (Utah 1980)*.

Once adjacent landowners have acquiesced in a boundary for a long period of time, the operation of the doctrine of boundary by acquiescence is not vitiated by a subsequent discovery of the true record boundary by one of the parties. See *Staker , 785 P.2d at 421*; see also *Brown, 622 P.2d at 1177-78* ("The title lost by defendants' predecessors by virtue of the operation of the doctrine of

boundary by acquiescence did not revert to the defendants nor to the former owners of the record title when the surveyors established the record title line . ."); *Tripp v. Bagley, 74 Utah 57, 276 P. 912, 916 (Utah 1928)* ("Where the owners of adjoining lands occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, they and their grantees may not deny that the boundary line thus recognized is the true one."); *Rydalch v. Anderson, 37 Utah 99, 107 P. 25, 30 (Utah 1910)* ("Where owners of adjacent parcels of land have occupied, adversely to each other for more than [the required period of time], their respective tracts by a division line, which each has recognized and acquiesced in as the true boundary line, during all of that time, either is estopped from afterwards questioning it as the true line." (quoting *Johnson v. Brown, 63 Cal. 391, 393 (Cal. 1883))*. Therefore, because Veibell and his predecessors-in-interest acquiesced in the fence for a long period of time prior to his discovery of the true record boundary, the trial court properly found that legal title to the east triangle had vested in the Veibells.

RHN Corp. v. Veibell, 2004 UT 60, P22-31.

This position of the Utah appellate courts was brought forward in time when the Curt of Appeals made the ruling in the 2004 case of *Dahl Investment Co. v. Hughes* wherein the court ruled:

> The Hugheses agree that the fence served as a boundary from approximately 1925 to 1965, and that during this period, Van Dahl's parents and their neighbor to the west acquiesced in the fence as a boundary. However, the Hugheses contend that Dahl Investment must show that subsequent neighbors have acquiesced to the boundary and that the boundary is still visibly marked. We disagree. . . Accordingly, the district court did not err in finding that Dahl Investment had established a boundary by acquiescence. As previously noted, in a boundary by acquiescence claim, a plaintiff must only show that the necessary elements were in place for at least twenty years. Once twenty years have passed, the boundary

is established. *Dahl Investment Co. v. Hughes* 101 P.3d 830, 833 (Utah App. 2004)

In this action, the Court ruled that it had not been demonstrated by a preponderance of the evidence that the landowners occupied the land up to a visible line for a complete period of 20 years, and that it has not been demonstrated that the parties mutually acquiesced to the line as a boundary for a period of 20 years, stating that there is no evidence to show that the landowners demonstrated the raising of livestock only up to a line, irrigated, cultivated or farmed up to a line, or occupied up to but never over the line to evidence acquiescence.

In this action, the Court failed to define the requisite 20 years period it was considering when it made its ruling. Alan Pitt defined the 20 year period as beginning when his parents bought the farm from the Shields in February 1952, at which time it was undisputed that the Harris family, as neighbors to the west, had long before built a fence all the way south to north along the Pitt property boundary which they and the Pitts recognized as a boundary and that they and the Pitts farmed, irrigated, and raised livestock only within their respective fenced areas during the entire period from 1952 until no earlier than May 1975. When asked of his personal knowledge about the old boundary between the properties, the defendant Robert Taron himself testified that the "*old Harris fence that's been there for years that was an eastern boundary of the eastern strip* (the subject land). which leaves the court's ruling to the contrary clearly erroneous.

There was no evidence whatsoever presented that the Harris family or their successors the Tarons, ever crossed over the Pitt fence line for any reason which leaves the court's ruling to the contrary unsupported by the evidence.

It is also undisputed that subsequently, only after the required 20 years period of acquiescence was over no earlier than May 1975, the Harris estate stopped using the Harris land for sheep operations or any other use until Robert Taron purchased the land in 1987. In the interim, the Pitts let the fences deteriorate and more or less let their animals run free until the fence was rebuilt in its original position in about 1995, but no one from the Harris family ever crossed over on to the disputed portion of the Pitt's land. Therefore, on this issue, it was clearly erroneous for the Court to find as is did.

As described in *RHN Corp. v. Veibell,* the doctrine of boundary by acquiescence only required Pitt to show his use of the Taron land and the existence of the visible boundary for a period of 20 continuous years. As described in *Dahl Investment Co. v. Hughes,* once twenty years have passed, the boundary is established and is not extinguished by the subsequent disappearance of the visible boundary. Therefore, by the case law of Utah, the title to the disputed land had "ripened into a legal title" to the Pitts while it was still in the hands of the Harris family, long before Taron purchased the land. The title lost by Taron's predecessors by virtue of the operation of the doctrine of boundary by acquiescence did not revert to Taron nor to the former owners of the record title when the surveyors established the record title deed line in 2005.

In announcing its ruling concerning the boundary by acquiescence claim concerning the Taron property, the court only addressed very briefly the hours of testimony presented by the plaintiff both on direct and cross examination with the

summary statement "*The plaintiff presented numerous photographs at different periods of time. As well, the plaintiff provided witnesses who saw fence line markings in large number - a large number of times. Craig and Alan Pitt both testified that they remembered a fence when they were young kids, different portions."* (Tr. 366 Line 11-17)

The court never mentioned any of the testimony given by Johnny Pitt nor did the court refer specifically to any of the many photographic exhibits from the 1950's through the 1970's the three Pitt brothers had described in detail during their testimony.

Robert Taron did not deny the existence of the fence line as shown in the plaintiff's exhibits #6 or #9 which established the fence was there until at least 1974. (Tr. 275 Line 16 – Tr. 276 Line 10) I Instead, the court supported its finding that Pitt failed to prove his occupation up to a visible line for 20 years by citing the testimony of Holly Shields when the court stated that "*she grew up on the property and can only remember open fields with no permanent fences or markers She further testified that when the fences were put up they were constantly moving back and forth with no permanent placement trying to move water lines and accommodating sheep.*" (Tr. 366 Line 25 – 367 Line 5)

The court also referred to this same testimony of Holly Shields concerning temporary fences when discussing acquiescence. (Tr. 368 Line 12-14)

Although Holly Shields had testified extensively about being able to run and play in open hay fields with the only fences she ever remembered since she was a child in the late 1960's and the early 1970's being only temporary and used only to keep the sheep in, (Tr. 200 Line 11-19) upon cross examination she refused to recognize

photographic reality. During direct testimony, Holly Shields specifically stated that "*There was nothing ever, a permanent fixture put up there until after my dad purchased it . . . in 1987.*" (Tr. 202 Line9-18) However, on cross examination, when asked directly about the fence shown in exhibit # 9 she said there was no permanent fence to the west of the front of the Pitts home. (Tr. 212 Line 10-20) Holly Shields also said that what was shown in the photo was only a temporary fence that changed over time just as all of the other fences were temporary. (Tr. 212 Line 10-22)

Given the undisputed photographic evidence that this particular portion of the fence had been in place continuously from 1952 until the mid 1970's it was clearly erroneous for the court to credit her testimony of this being only a temporary fence while disregarding the testimony of Johnny Pitt, Craig Pitt, Alan Pitt who all testified that the fence in the photos had been there from 1952 until it was replaced in 1987 with the fence that still stands there today; while disregarding the testimony of her brother Mike Taron who swore that "for sure" that fence was there during the same time she said it was not; and while disregarding the testimony of her father Robert Taron, who testified that the fences were always in place until at least 1975 because of the sheep operations held there each winter.

It was also clearly erroneous for the court to disregard the supporting photographic evidence of the permanent fence in favor of the defendant's daughter's perception of open fields and only temporary fences when describing the exact same location shown in the photos of the permanent fencing.

As with Holly Shields, the court apparently gave great credence to Sharon Caldwell when it quoted her to say "*since the late `70s the fence was a movable string*

of pallets and wood. She routinely sees sheep wandering back and forth. (Tr. 367 Line 5-7). It was clearly erroneous for the court to disregard the testimony of the three Pitt bothers and the undisputed supporting photographic evidence presented to prove a continuing existence of a fence line from 1952 until 1975, by accepting the testimony of a friend of the defendant that admitted she had not ever been there during the time period in question and denied ever seeing a fence that was clearly present in the photographic evidence.

Additionally, the testimony of Sharon Caldwell, that the trailer home was located in the middle of the Taron property for some period of time, not along the eastern boundary of the Taron property was in direct conflict with the testimony of Vicki Hildebrand who testified that the trailer home located on Taron's land was very close to the trees, (Tr. 105 Line 9-12) and yet the court cited the testimony of these two witnesses as credible against photographic evidence to the contrary.

The court supported its finding that Pitt failed to prove his occupation up to a visible line for 20 years by citing the testimony of Vicki Hildebrand that she had lived across the street for the 20 years after she moved there in 1989 and that she did not see a fence between the Pitt and Taron property at that time.

Given the photographic and testimonial evidence that a fence had been in place all along the Pitt's western boundary continuously from 1952 until the mid 1970's, it was clearly erroneous for the court to disregard the testimony of the three Pitt brothers, Mike and Robert Taron, and the undisputed photographic evidence of such a fence being in place for the entire subject period in favor of the defendant's neighbor Vicki Hildebrand,

who admitted that she had no knowledge of the land before 1989 which was at least 14 years after the subject time period. (Tr. 107 Line 22).

The testimony of Mike Taron, the son of Robert Taron, that when he was 6 or 7 years old there was a section of fence for sure between the Pitt's and the Taron's property from the front of the property to the north edge of the [Pitt] house (Tr. 111 Line 2-20) directly supports the testimony of the three Pitt brothers and the photographic exhibits presented by the Pitts while directly contradicting the testimony of his father Robert Taron, that the panels separating the property would constantly move depending on the livestock's needs and the testimony of his sister Holly Shields, that no fence existed in that area during the twenty years between 1952 and 1972.

The court cited Robert Taron as saying that the panels separating the property would constantly move depending on the livestock's needs, but in his direct testimony he confirmed that "Up to '74 or '75, there was fencing between the Pitt property and the Taron property (Tr. 265 Line 12-19), and that he helped construct the replacement fence without complaint, (Tr. 263 Line 15-22) which the court did not mention at all in its findings.

In its ruling, the court never mentioned the issue of Taron not only having all of the acreage his deed described but significantly more, while Pitt had significantly less acreage than his deed described if Pitt's claims were denied.

PRESCRIPTIVE EASEMENT OVER THE WESTERN PORTION OF DEWSNUP LAND

Concerning the second issue on appeal, the trial court correctly identified that to prevail on his claim of a prescriptive easement Pitt was required to prove by clear and convincing evidence his "use of another's land was "(1) open, (2) notorious, (3)

adverse, and (4) continuous for at least 20 years." *Marchant v. Park City*, 788 P.2d 520,524 (Utah 1990) "A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose." Id. at 681.

In this matter, when announcing its ruling concerning Pitt's claim of a prescriptive easement, the trial court correctly stated that Pitt has routinely and openly used a portion of this property to ingress and egress from his property located behind his home and was asking the court to find a prescriptive easement along the Dewsnup property so he can continue to use the neighbors' property to access the back of his property as he had in the past.

In order to disqualify Pitt's claim of a prescriptive easement, the trial Court stated *"There was evidence that Mr. Alan Pitt was incarcerated for different periods throughout his life, the longest period being one full year. He and his mother since 1998 are the only two on the deed to the property and he was in prison from the period of 2003 to 2004. No credible evidence received that anyone used this property or the proposed easement at that time was produced. Further, there was no evidence supporting an unbroken chain of use* ***for the last*** *20 years."* (Tr. 371 Line 22 – T.372 Line 5)

On this issue, the court failed to cite the testimony of any witness to support its finding that Pitt failed to prove his use of the Dewsnup's land for 20 continuous years. The court's assumption that the use had to be *"for the* ***last*** *20 years"* is clearly erroneous. Just as with the doctrine of boundary by acquiescence as described in *RHN Corp. v. Veibell,* the prescriptive easement doctrine requires Pitt to show his use of the Dewsnup's land only for 20 continuous years. However, once the requisite 20 years of use has been completed, the prescriptive property right to continue such use

"ripens" into a legal right that is not vitiated by a subsequent denial of access by the Dewsnups placing boulders in the long used pathway.

In Utah, "[a] party claiming a prescriptive easement must prove that his use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years." *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998) (emphasis added). "However, once a claimant has shown an open and continuous use of the land under claim of right for the twenty-year prescriptive period, the use will be presumed to have been adverse." Id. "To prevent the prescriptive easement from arising, the owner of the servient estate then has the burden of establishing that the use was initially permissive." *Valcarce* at 311-12.

Just as it failed to define the pertinent 20 year period of time required for Pitt to establish boundary by acquiescence, the trial court erred when it failed to identify in its findings what it considered as the beginning and the ending of 20 years of continuous use of the Dewsnup's land by Pitt required for Pitt to prevail.

Alan Pitt defined the 20 year prescriptive period as beginning when his parents bought the farm from the Shields in 1952 by claiming *"All my life we've used that,"* by driving across the Dewsnup property to access our barnyard. Alan said "*from the '60's all the way through the '90's up to today,*" he and his brother Craig used the barnyard access across the Dewsnup land to access and feed Craig's sheep. No testimony whatsoever was introduced to dispute Alan Pitt's testimony, that the prescriptive use period began no later than in the 1960's and was a completed at least 25 years before this law suit was filed.

The court made no mention of the also undisputed fact that the Pitts often and repeatedly parked farm equipment on the Dewsnup's land for the same 20 plus year period.

The court simply stated that *"he* [Alan Pitt]*was in prison from the period of 2003 to 2004"* It was clearly erroneous for the court to use a one year absence by Alan Pitt in 2003 to negate Pitt's undisputed claim that his family had used the subject land for more than 20 continuous years beginning in the 1960's and it was error for the court to completely disregard without comment undisputed photographic evidence such as plaintiff's exhibit #24, which showed the Pitt family's use of the Dewsnup land to access their barnyard in 1981.

It was also clearly erroneous for the court to use a one year absence by Alan Pitt in 2003 to negate Pitt's undisputed claim that the two neighboring families had used the adjoining properties as a joint driveway for the last 50 years.

The court's observation within its ruling that " *He and his mother since 1998 are the only two on the deed to the property. . ."* while factually correct its totally irrelevant as neither the defendant nor the court have cited any authority whatsoever requiring that a person be on the title to real property in order to claim a prescriptive easement.

It was clearly erroneous for the court to disregard the undisputed testimony and photographic evidence of 20 years of use, thus Pitt had met his burden by clear and convincing evidence that his family has shown an open and continuous use of the land for the twenty-year prescriptive period. At that point in the analysis, to prevent the prescriptive easement from arising, the Dewsnups had the burden of establishing that the use was initially permissive." *Valcarce* at 311-12.

The Court cited as its second reason to deny Pitt's claim "*the purpose of the law is to assure peace and good order of our society by leaving the long term status quo at rest. To do this the claimant must prove that he used the property peacefully without interference for the last 20 years. This has not been proven. In fact, the use of the property has been in dispute for this entire time.*"

However, the undisputed long term status quo was that the Pitts had crossed the Dewsnups land without interruption at least weekly for at least forty years. The Court obviously referred to the *Richins* case in formulating this portion of its ruling. In *Richins*, the Court referred to the

> "fundamental principles applicable to prescriptive rights," which arise out of "the general policy of the law of assuring the peace and good order of society by leaving a long established status quo at rest rather than by disturbing it." 412 P.2d at 315. To further that policy, the Court presumed that the once mutually permissive common driveway should be deemed adverse for purposes of the adverseness requirement. See id. This holding is not unusual. See, e.g., *Lee v. Lozier*, 88 Wash. App. 176, 945 P.2d 214, 218 (Wash. Ct. App. 1997), (holding that "claimants who were granted permission to use land or who believe that they hold an express easement are not automatically precluded from claiming that they are entitled to a prescriptive easement"; rather, when an oral grant of an easement has been given and not recorded and the prescriptive period is met**, then the oral grant "'ripens into a prescriptive easement.'"** (quoting *Washburn v. Esser*, 9 Wash. App. 169, 511 P.2d 1387, 1390 (Wash. Ct. App. 1973))).

Richins v. Struhs, 17 Utah 2d 356, 412 P.2d 314, 315 (Utah 1966).

Addressing the issue of permission, the trial court stated that "*there's also ample evidence of use by permission which defeats the prescriptive easement claim. Craig Pitt testified that he remembered an agreement the parties had that would allow the Pitts to*

drive through the Shield's yard. Sally Dewsnup also testified that Alan Pitt informed her he had an agreement with her mother to allow passage through the land. Alan Pitt testified that in the `60s his family tried to trade the northeast sliver of land for the southeast sliver of land that's the subject of this easement. That deal fell apart but the Pitt family still used the property inferring the Shields allowed this to continue. Alan Pitt testified that it was possible that hi father had an agreement with the Shield's father to allow passage through the land. Sometime in the `70s, Mr. Shields began to erect a fence that would eliminate access to the proposed easement. Mr. Pitt met with him and convinced him not to do it, allowing him to continue to use the easement. Larry Dewsnup testified that Alan Pitt himself told him that Pitt believed that Margaret Shields granted him permission to drive across the land. Rebecca Dewsnup witnessed Pitt telling Sally that he couldn't believe she wouldn't honor her father's agreement to allow him to drive through the property.

The court cites several incidents claimed by the defendants to prove permission such as "*Craig Pitt testified that he remembered an agreement the parties had that would allow the Pitts to drive through the Shield's yard."* However, what Craig Pitt actually said was Lowell Shields and his father Don Pitt had made an agreement that Shields *"would give us that right-of-way as part of our property because of something my father had give him*" (Tr. 57 Line 3-11)

The court said *"Larry Dewsnup testified that Alan Pitt himself told him that Pitt believed that Margaret Shields granted him permission to drive across the land."* What Larry Dewsnup actually said was, during an argument in 2006, "*Craig Pitt was*

complaining that my mom would not honor her dad's word about something with letting them drive trough there" (Tr. 230 Line 10 –13)

The court said "*Sally Dewsnup also testified that Alan Pitt informed her he had an agreement with her mother to allow passage through the land"* What Sally actually said was "Y*es, he come over later and he said, Well, your mom and I had an agreement that we could drive through here, you know. And I said "Well I'm not aware of any agreement. My mom never told me that, she always said the opposite*" (Tr. 300 Line 18-22.

While the court said "*Rebecca Dewsnup witnessed Pitt telling Sally that he couldn't believe she wouldn't honor her father's agreement to allow him to drive through the property,"* Rebecca Dewsnup stated she had no personal knowledge about the subject land prior to 1994.

The dispute about who said what about who made what agreement back in the 1960's, is not important, because even if there had been an agreement between the Shields and the Pitts back in the 1960's,because under the *Richins* line of cases, when an oral grant of an easement has been given and not recorded and the prescriptive period is met then the oral grant ripens into a prescriptive easement.

Concerning the court's findings that "*It is required that the use be adverse but the Utah Appellate Courts are clear that if it is open and continuous, this would qualify under adverse. The word adverse should not be connotated to mean militant or violent as this offends public policy, advocating the right to have a peaceful existence.*

In finding of equity as above, defendant will not be afforded the full benefit of home and property owner with the existence of this easement. Further, the plaintiff in

this matter has admitted that the back portion of his property is accessible through his driveway; however, he feels that would be inconvenient. The defendant's property rights outweigh the convenience cited by the plaintiff.

Also In Utah, the Appellate Courts have ruled that the fact that the parties were initially friendly with one another did not prevent a prescriptive right from arising. *Valcarce* at 312.

The Pitt and Shields families were closely related and friendly with each other to the point that the Pitts lived in the basement of the Shield's home while they built their home on the property they bought from the Shields in1952. They were friendly and close enough that when Mr. Shields began to build a chain link fence that would interfere with the passageway Mr. Pitt had been using for years, Pitt asked to have the construction stopped and Mr. Shields complied.

As time when on, Mr. Shields died leaving Margaret as the neighbor to the Pitts. At trial, there is conflicting testimony about whether or not Margaret feared Alan or his associates, or disliked the Pitts ongoing use of her land to access their yard. The trial testimony from the Pitts side was that the Shields never complained of their use of the passageway. The Dewsnups side said they did complain both before and after the Dewsnups moved on to the land in 2005.

What is undisputed by evidence from anyone is that for more than 50 years, the Shields and then Dewsnups never took any action whatsoever to stop the Pitts use of their land until the Dewsnups brought in the boulders in 2006. There was never a complaint of trespass to the law enforcement agencies of the area, there was never any court action of any kind and there was never even so much as a written demand to quit

using the passageway from the Shields. Also what is undisputed is that the Pitts use of the land over those 50 years was open and continuous to the point Alan Pitt parked his car in Margaret's front yard because his driveway was full. Until the Dewsnups brought in the boulders there was never any militant or violent act on either side and each family was having a peaceful existence. It is clearly erroneous for this court to deny the property right that accrued to the Pitt family over a 50 year period by simply stating *"the defendant will not be afforded the full benefit of home and property owner"* when the property owner Sally Dewsnup came to the property knowing full well that the Pitts had been using this right for her entire lifetime.

Moving on to the trial courts reasons to deny the claim numbered four and five, the court stated that "*This easement claim would effectively deprive fundamental rights of the Dewsnups that they are due as property owners. Having vehicles driving a few feet from a person's home where the homeowner can actually hear the rumbling in the ground, is not the best use for a house. Being afraid to allow grandchildren to run freely inside of your yard is clear interference with landowner's rights. Not being able to landscape one's yard, to eliminate mud and provide privacy in one's own yard is a violation of one's property rights. Having to worry about traffic across the property potentially damaging her utilities is something that landowner shouldn't have to deal with. This also touches on some serious public policy issues. If you are asked to stay off of somebody's property and you continue to trespass, the law cannot reward this behavior, that is contrary to keeping the peace. Sally Dewsnup testified that she's asked Alan Pitt several times to quit driving on her property. As well, her mother asked the Pitts to move their vehicle off the property several times. They would and*

then move them back onto it. She also testified that the Pitt's parents were constantly asking to purchase the property from her parents and they always refused. Sally also encouraged her mother to fence in the property but her mother would not because of Alan's criminal background and she felt intimidated. In 2005 Alan Pitt signed a contract with Lowell Shields in an attempt to squeeze Dewsnup into selling him this land in question. Again, this attempt failed and Pitt knew the Dewsnups did not want him using the property. Another instance, Pitt attempted to lay out a garage that extended across the proposed easement and Margaret Shields stopped it. Another communicated instance where the Shields indicated they were not going to allow passage across their property. Then sometime in the 1990s Alan Pitt attempted to purchase the property from Margaret Shields again and again was denied. When the Dewsnups built their new existing home, they did it with no regard to an easement, further proof of their non-acceptance of the pathway. Rebecca Dewsnup testified that she saw Sally ask Pitt not to drive across their property on more than one occasion.

To address these findings, this Court must first separate in time the various statements made. As discussed above, the acts and statements of the Dewsnups who first came onto the land as owners some 20 years after the prescriptive period had been already been completed can not serve as a reason to deny the requested easement if it had already ripened into a right to "use property belonging to another for a limited purpose." Likewise, the Pitt's failed attempts to keep peace in the neighborhood by purchasing a right-of-way to the passageway, nor the Dewsnup's disapproval or dislike of the Pitts crossing the passageway has no relevance

whatsoever to the creation and enforcement of the prescriptive right that by law, matured more than 20 years before the Dewsnup's arrived on the land.

The Dewsnups repeatedly admitted that they came to the land in 2005 knowing full well the Pitts had been using the passageway for many years. The court's ruling as stated above referred to such knowledge several times.

Under Utah's prescriptive easement doctrine, the Dewsnups can not come on scene years after Pitt's prescriptive right had ripened and defeat that existing property right by placing boulders in the passageway or even by choosing to place their new home close to the passageway that they knew full well existed and then claiming that equity demands the Pitts prescriptive right to keep doing what they had done for over 40 years must be sacrificed for the Dewsnups benefit.

While the court's compassion for the Dewsnup's right to enjoy their property without any interference is admirable, by refusing to acknowledge the Pitts property right to cross the western 12 feet of the Dewsnup land to access their land, it is no more legally supportable than the trial court becoming biased against Mr. Pitt at the defense's mention of a prior drug conviction when considering rights to real property.

FAIR TRIAL

The examination of witnesses concerning relevant facts is essential to the concept of the litigants having their day in court. In this action, Alan was denied his constitutional right to a open court when the trial judge arbitrarily terminated the cross examination of the key defendant Robert Taron not because of relevancy of the questions, or abuse of the witness, but rather because of an artificial time constraint

created by the Judge in response to the use of the court room by the Court of Appeals on Friday of the week of trial. (Tr. 135, Line 12-16) It was never suggested by the trial court that the trial could be continued until the following week or some later date if time was too short to allow a full examination of critical witnesses.

The termination of Taron's cross examination by Pitt's attorney concerning argircurtural uses of the land before he was allowed to ask many of the questions he had planned for the very elusive witness Robert Taron when the court *said "Mr. Tanner, do you have any questions? Your time is up Mr. Buhler,"* and the denial of questions Pitt's attorney had about the photographs the defense had offered as exhibits was a clear abuse of discretion by the trail court, given the adverse ruling later made by the court concerning these very issues.

Pitt's attorney was also precluded from inquiring into the issue of a windfall increase in the acreage of Taron's land if the Pitt claim was denied. According to the second survey (Plaintiff's exhibit #1), the land enclosed within the parcel claimed under this quiet title (parcel 3-17-23) measures a total of 79.82 feet west to east on the north end of the parcel and some what more on the south end. Should Pitt's boundary claims be denied, his parcel would measure only 67.91 feet west to east on the north end, which is significantly less than what is described in the original Pitt deed. At the same time, should Pitt's claim be denied, Robert Taron will receive a windfall increase in the acreage contained within his parcel which reaches from his existing fence line on his west boundary to the deed line on his eastern boundary as defined by the existing deed description. See Defendants' exhibit #1. This seems to Pitt to be a very unjust

selective determination of which law to apply, as he believes the law should be applied to both sides the same way.

Having arbitrarily terminated the cross examination of the very witness the plaintiff expected to verify the historical use of the Taron's land for agricultural purposes, the actual acreage of the Taron's parcel used for agriculture as divided by the fence, and the historical building placement in relation to the boundary verses the fence, the court ruled "*There is no evidence that the landowner's ever irrigated up to any specific line that they had acquiesced to as a boundary. There's no evidence that the land owners cultivated or farmed up to a line that they acquiesced to as a boundary.*"

This termination of a cross examination of a crucial witness on the key issues of the case against him, was clearly the denial of the plaintiff's right to an open Court.

The Utah Supreme Court has ruled "Because the one of the parties was effectively precluded from calling the witness under a restriction imposed by the trial court, there was substantial and prejudicial error, therefore it was necessary that the judgment be reversed and the case remanded." *Board of Educ. v. Barton, 617 P.2d 347, 347(Utah 1980)*

Here, because the plaintiff was effectively precluded from examining the witness under an artificial time restriction imposed by the trial court, there was a substantial and prejudicial error, the Court of Appeals can do no less than reverse the judgment and remand the case for determination of the excluded testimony. This is especially true given the apparent total disregard by the trial court of the extensive testimony of many of the witnesses cited above from both sides that the Taron land had indeed historically

been used for orchard production and for cow, sheep, and horse operations during the subject time period.

CONCLUSION

The trial court abused its discretion and made a clearly erroneous ruling when it disregarded volumes of undisputed photographic evidence and testimony from both the Pitts and the defendant Robert Taron that the old Harris fence had been in place for yeas and had been recognized by all as the undisputed boundary between the Pitt and Harris (Taron) properties since at least 1952; that the fence remained unchallenged as the boundary when Taron purchased the land in 1987; that the fence remained unchallenged as the boundary in 1995 when Taron helped reinstall it without complaint; and that the fence was challenged as the true boundary for the first time ever in 2005, when the Dewsnups had a survey completed after the Tooele County surveyor completed a dependant re-survey that shifted several of the historical monuments.

The trial court abused its discretion and made a clearly erroneous ruling when it disregarded unchallenged testimony that the Pitts had openly crossed over the Dewsnups land for a period of over 50 years without anyone taking any physical or legal action whatsoever and ruled the Pitts had not met the requirements of proving a prescriptive right to keep doing what they have been doing on the Dewsnup land.

Most importantly, the trial court abused its discretion which lead to the above mentioned clearly erroneous rulings when it not only allowed but considered evidence of the plaintiff's past criminal history in determining his rights to real property.

Therefore, the erroneous rulings of the trial court should be reversed and if necessary in this Court's opinion, this action should be remanded for the trial court to gather further evidence on the issues outlined above.

RESPECTFULLY SUBMITTED ON THIS 11th Day of September, 2008.

Gary Buhler
Attorney for Alan Pitt, Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this September 11, 2008 , I served a copy of the forgoing document, by depositing a true and correct copy thereof in the United States Mails, addressed to:

Richard Tanner
250 South Main
Tooele UT 84074

Gary Buhler

John P.T is now 50 yrs old

Fence WEST OF House

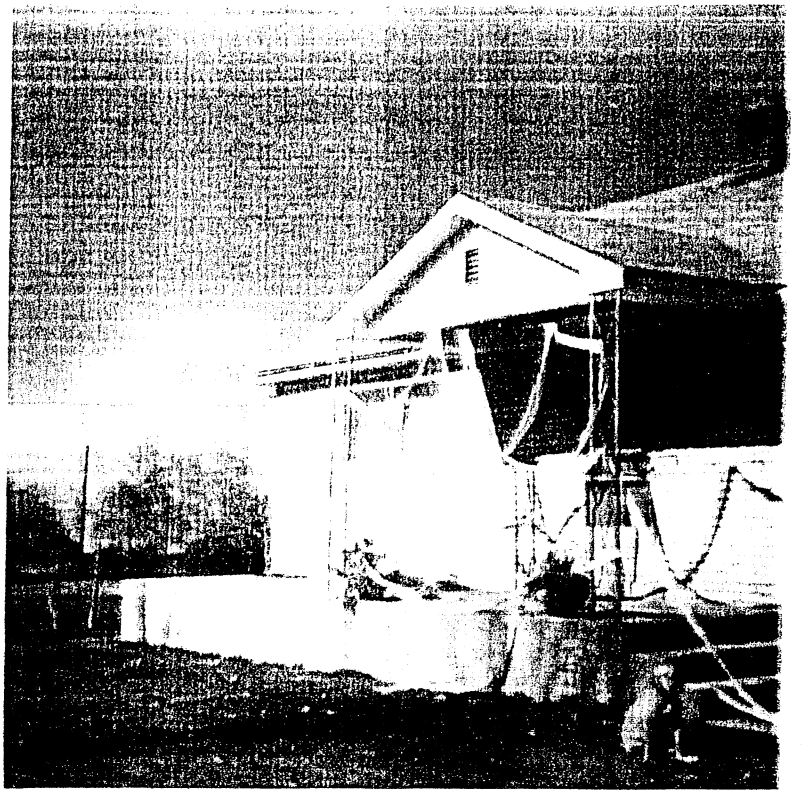
PENGAD-Bayonne, N.J.

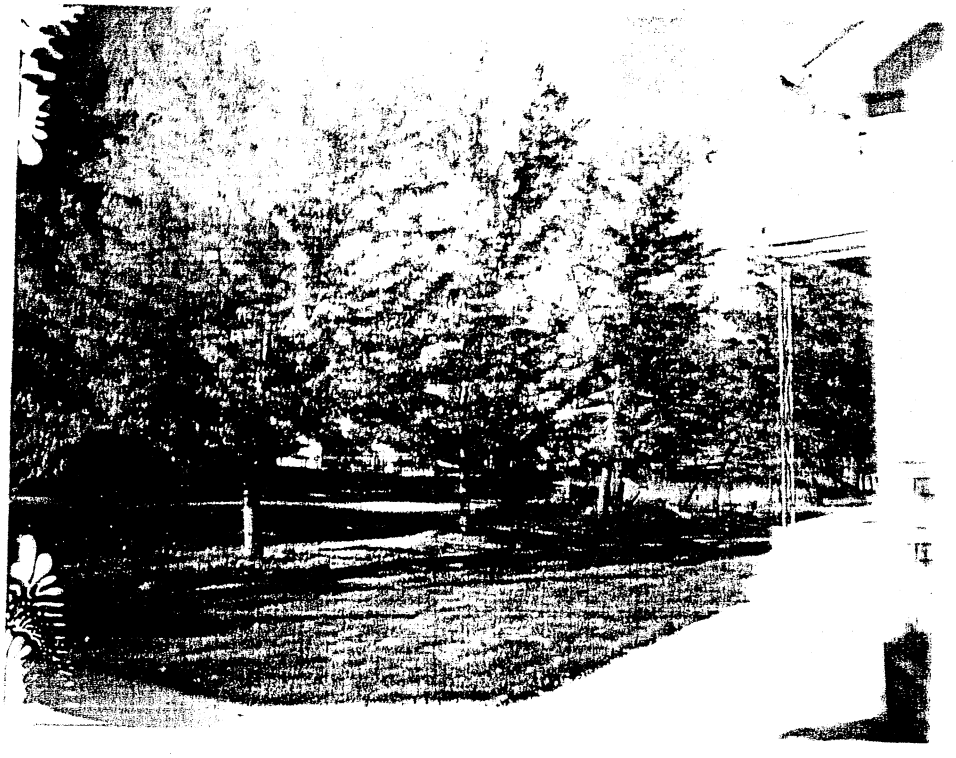
PLAINTIFF'S EXHIBIT 5

Front cover of Fence in 1963

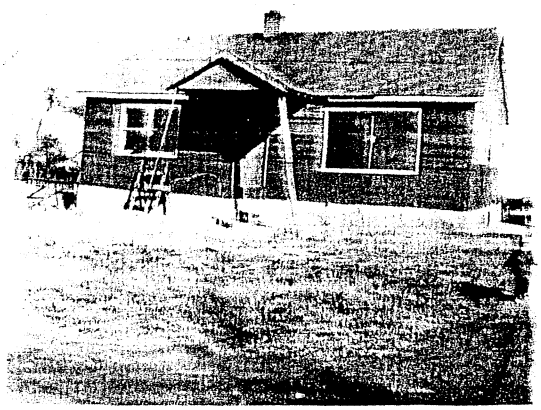
MAR • 63

ADDED #2

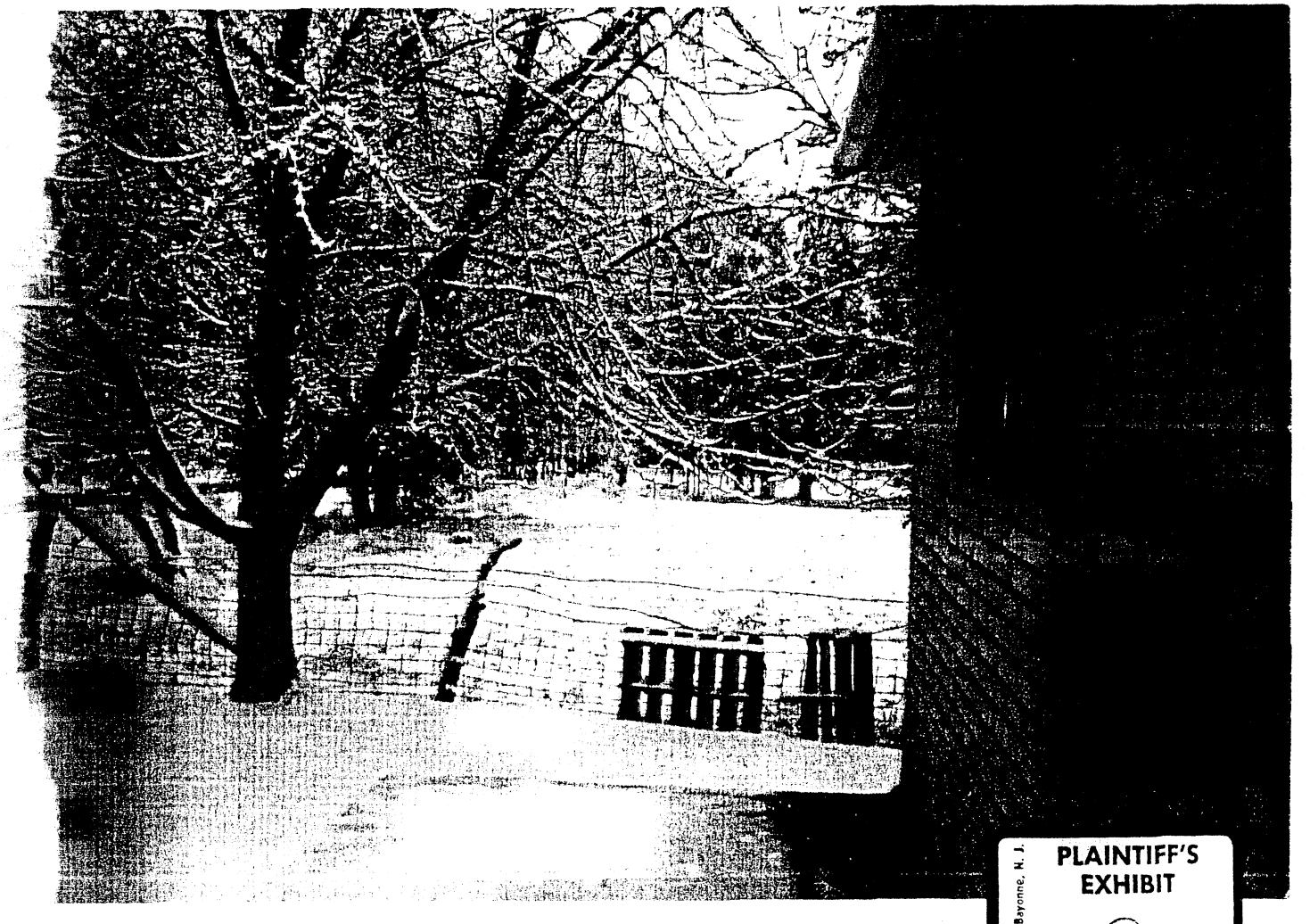




ADDAL #3



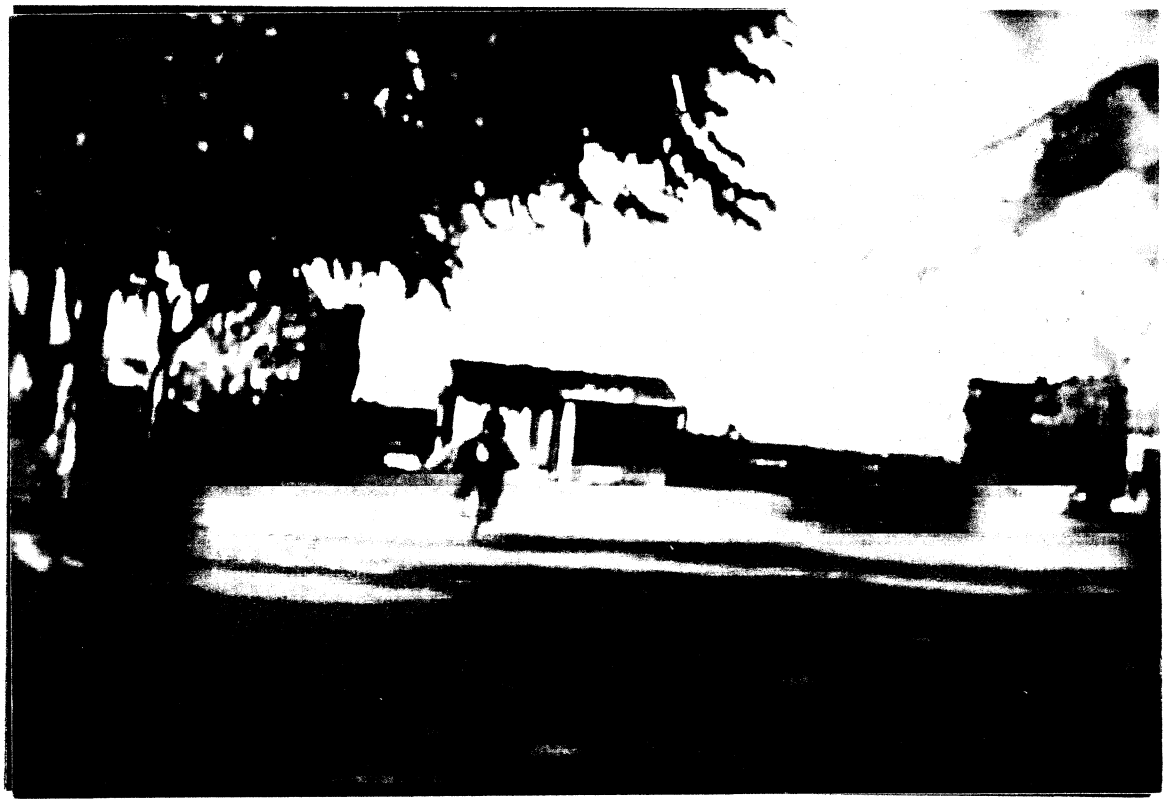
APPEN #4



PLAINTIFF'S EXHIBIT

NO. 9

NCAD-Bayonne, N. J.



ADDEN #6

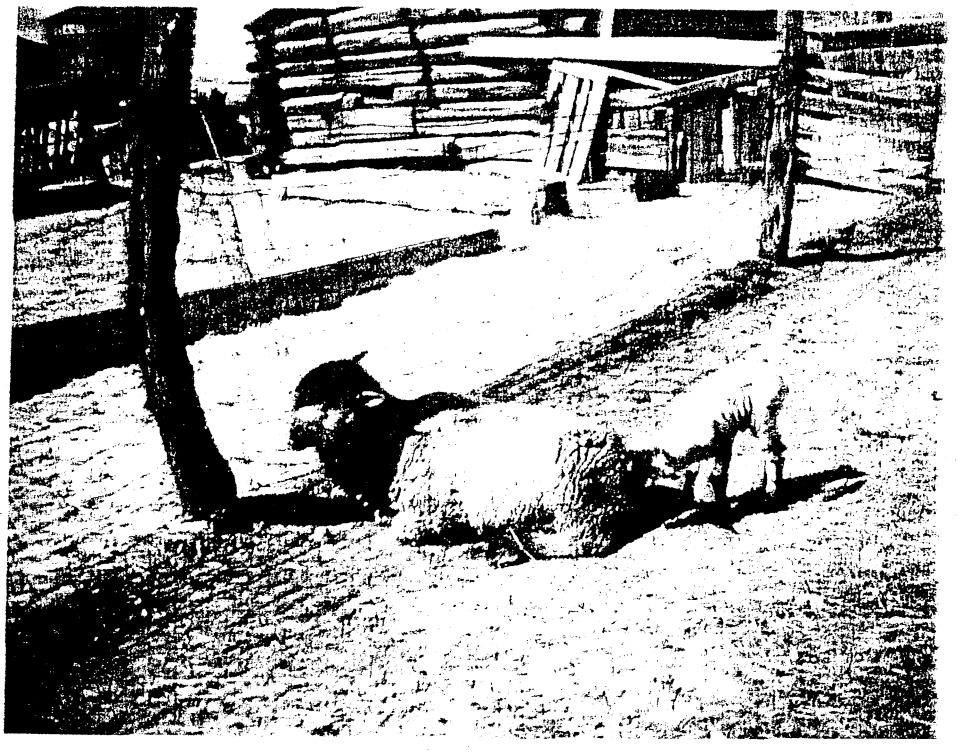
Hay Barn before Lost Roof

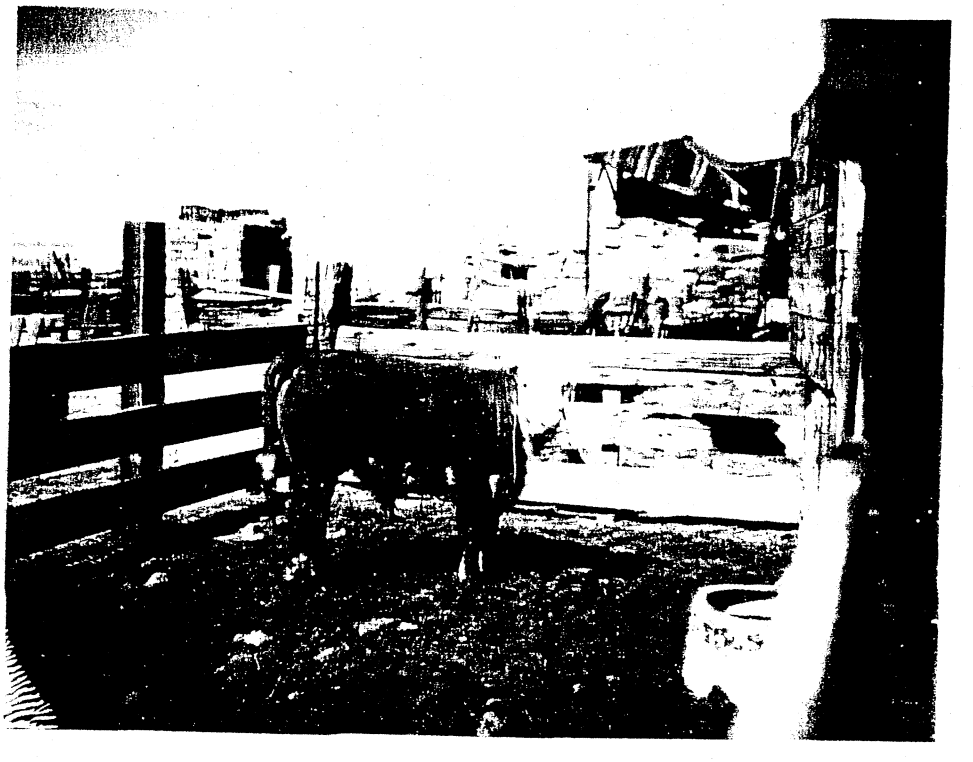
Fence on west side

1960's

PLAINTIFF'S EXHIBIT 11

PENGAD-Bayonne, N.J.





205

PAGE # 10

PLAINTIFF'S EXHIBIT NO. 15

PENGAD-Bayonne, N. J.

PENGAD-Bayonne N.J.

PLAINTIFF'S EXHIBIT

16

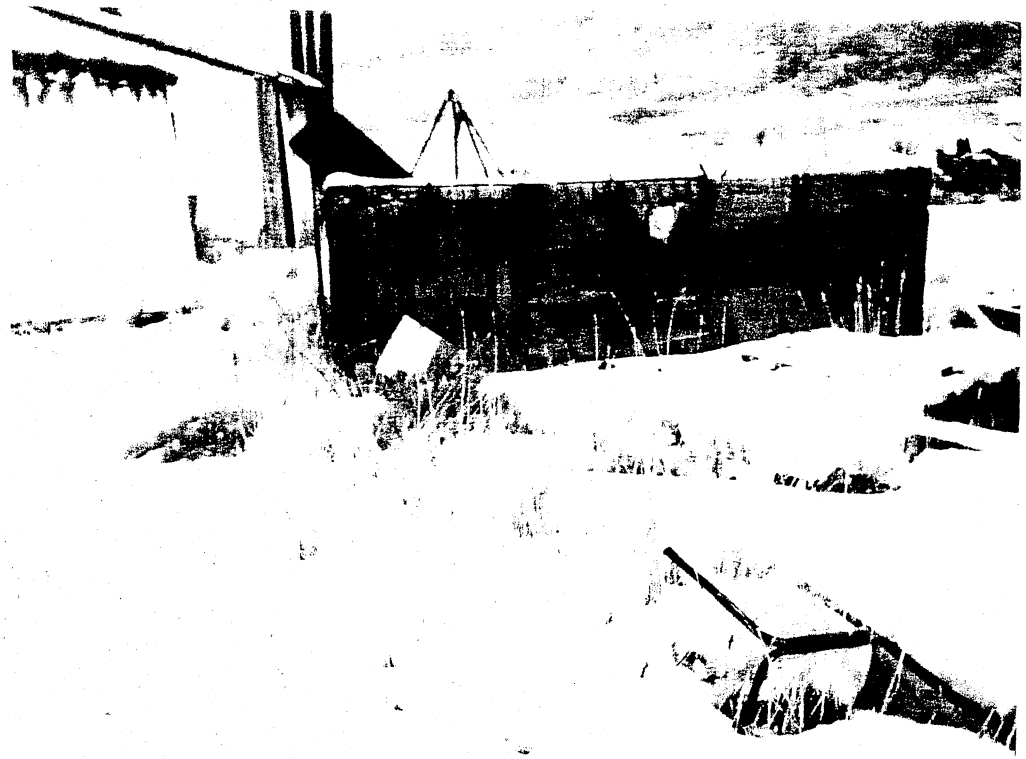
ADDEN # 12

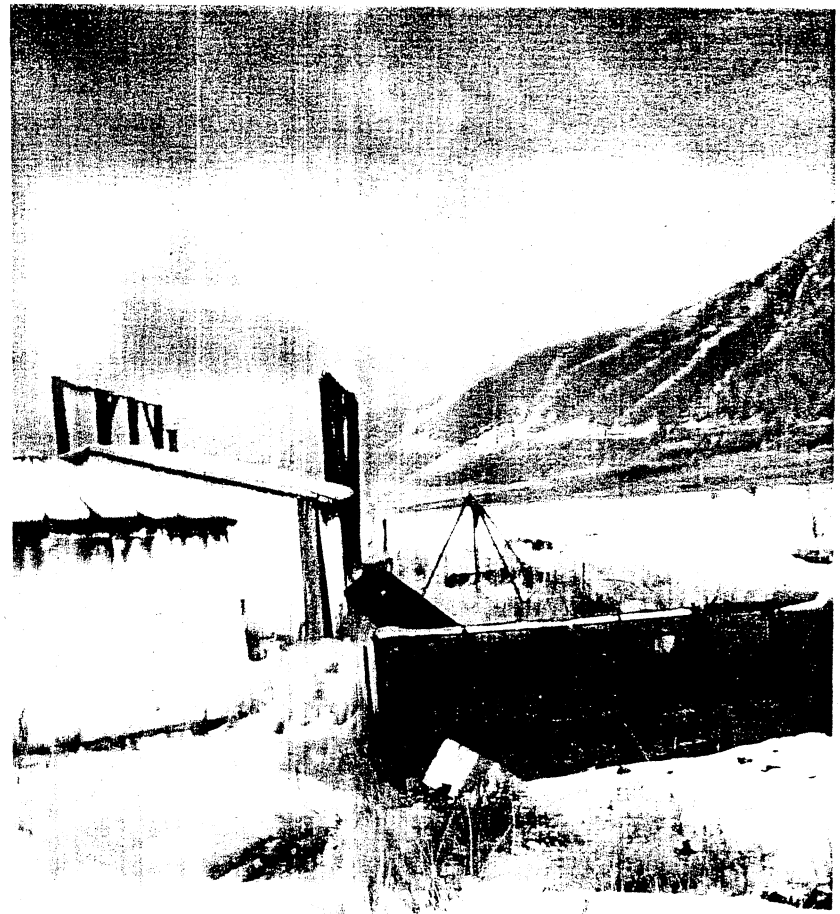
ADPEN #13

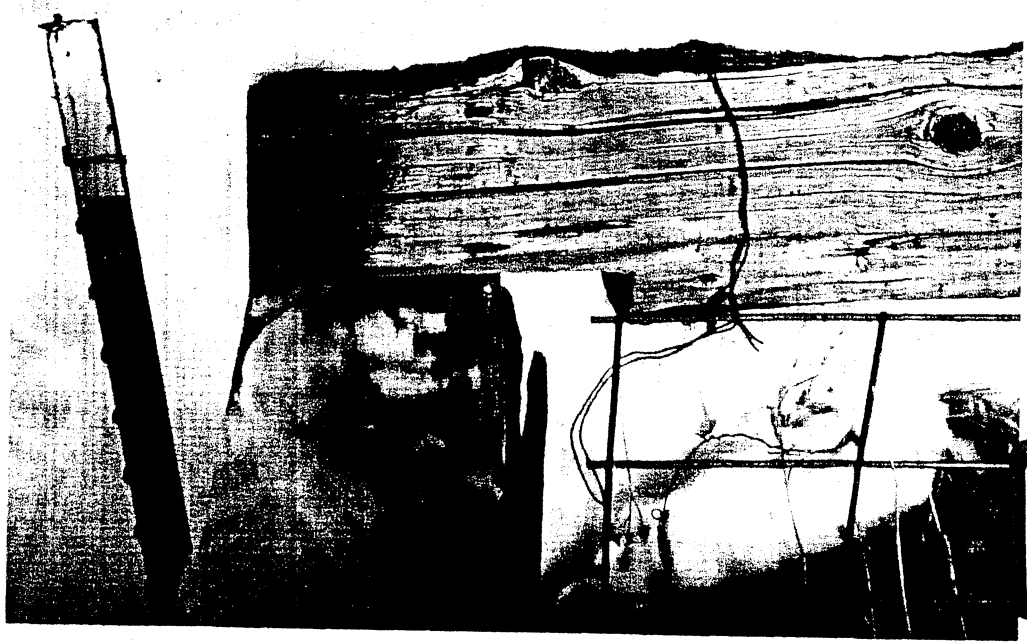
PLAINTIFF'S EXHIBIT 18

PENGAD-Bayonne, N.J.

APPEN H 14





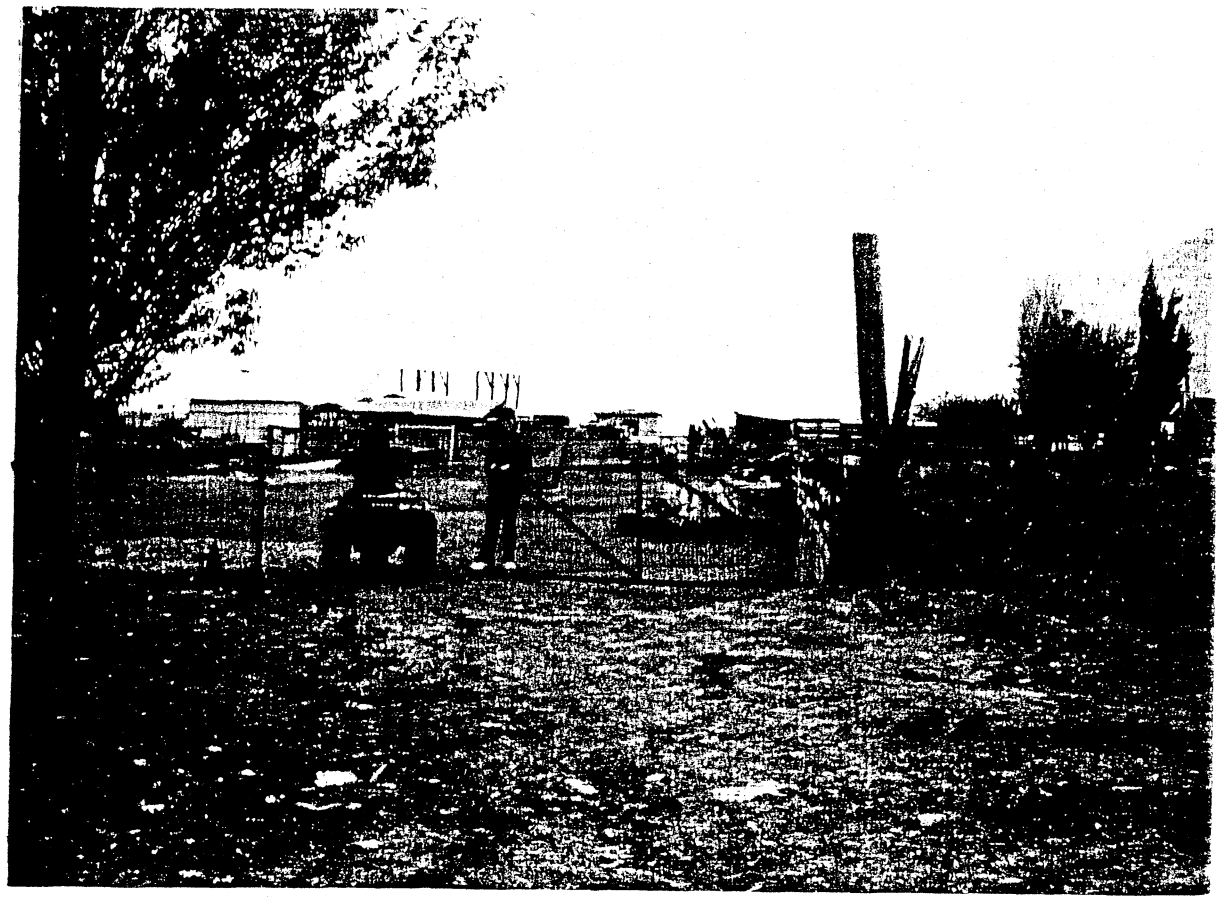


PLAINTIFF'S EXHIBIT

PENGAD-Bayonne, N.J.


PLAINTIFF'S
EXHIBIT
P-6
PENGAD-Bayonne, N.J.


PLAINTIFF'S
EXHIBIT
23
PENGAD-Bayonne, N.J.



PENGAD-Bayonne, N.J.

PLAINTIFF'S EXHIBIT

24

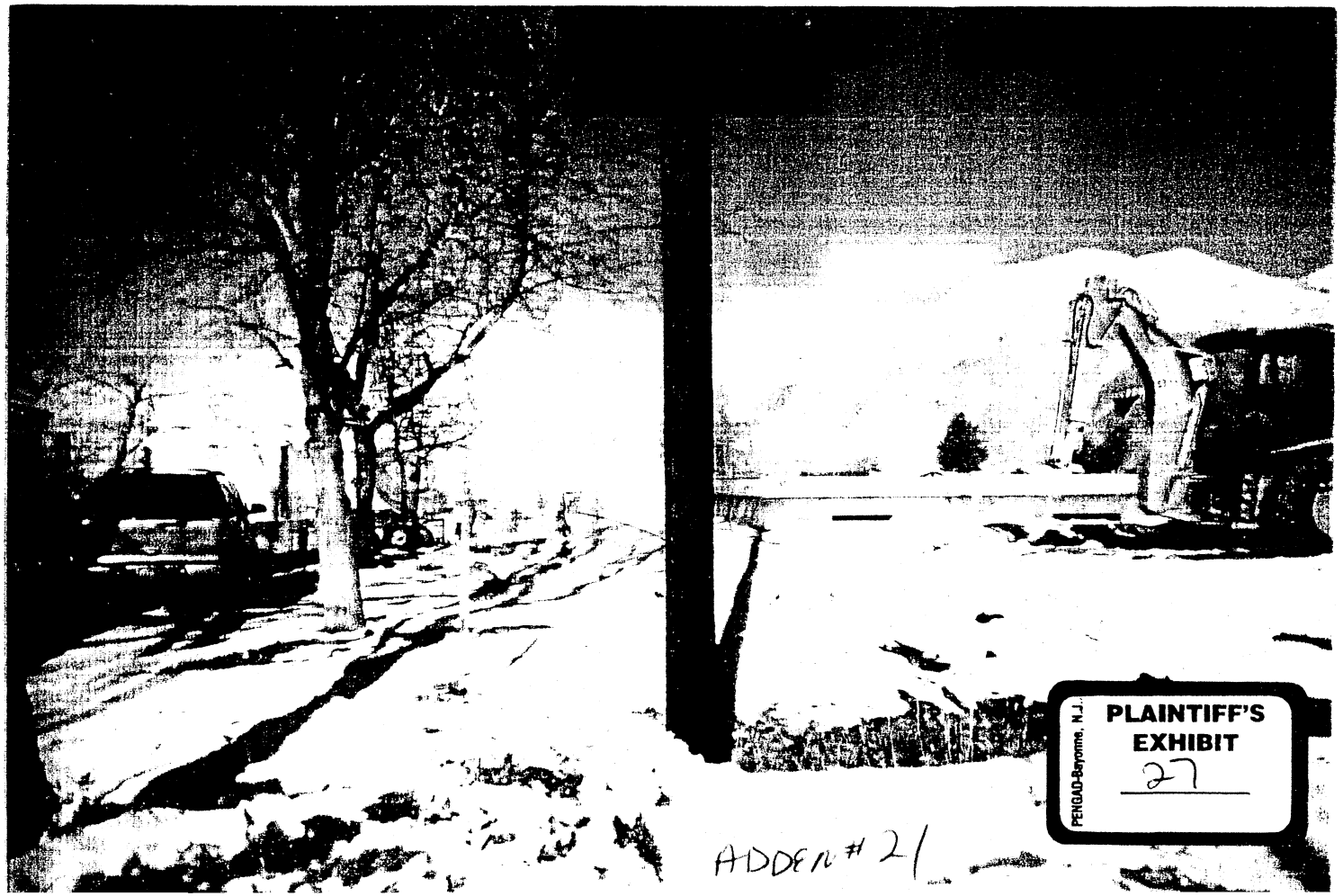
ADD'N # 18

PLAINTIFF'S EXHIBIT 25

PENGAD-Bayonne, N.J.

ADDEN # 19


PENGAD-Bayonne, N.J.
PLAINTIFF'S
EXHIBIT
26



PENGAD-Bayonne, N.J.

PLAINTIFF'S EXHIBIT 27

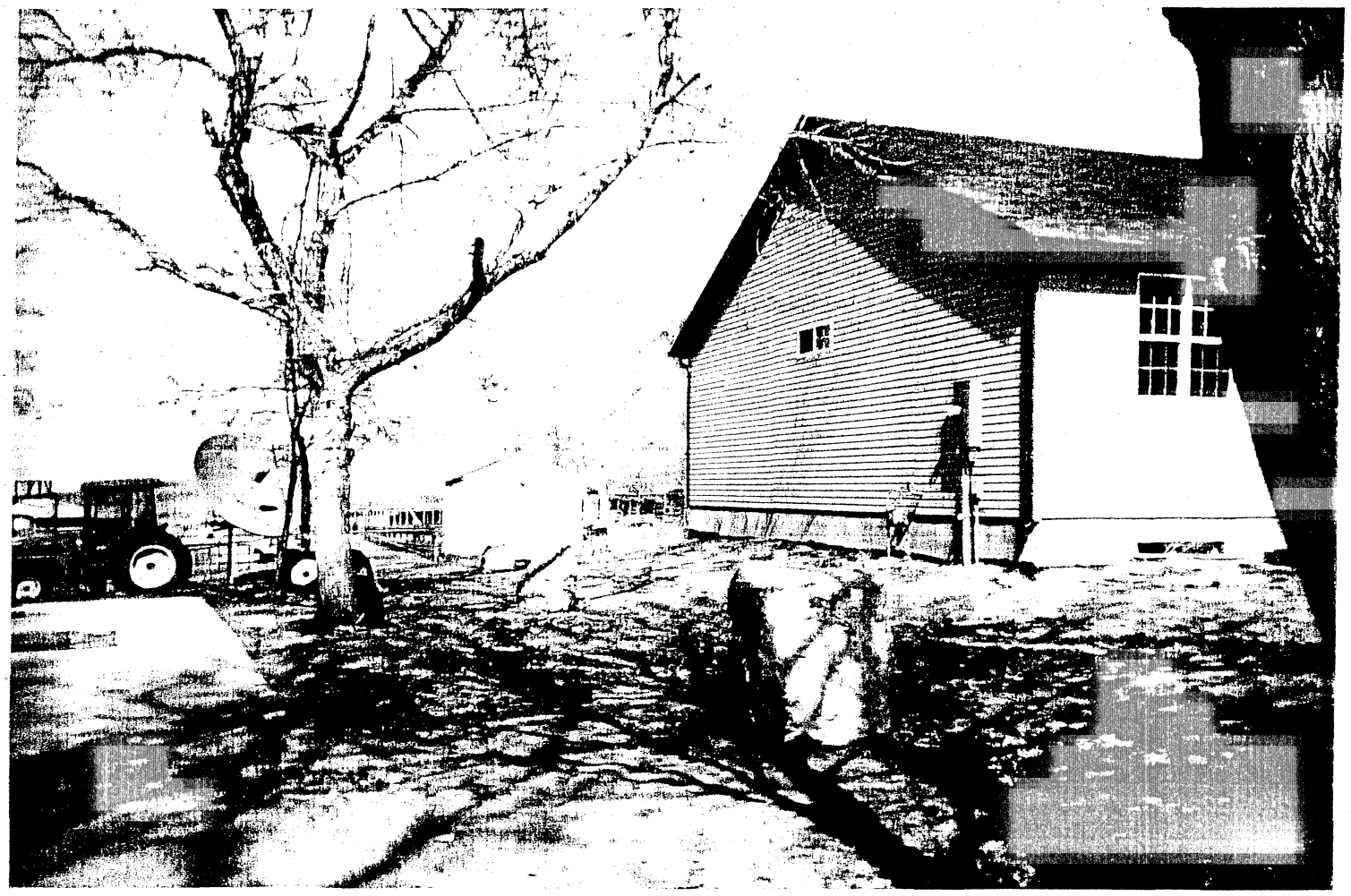
ADDEN # 21

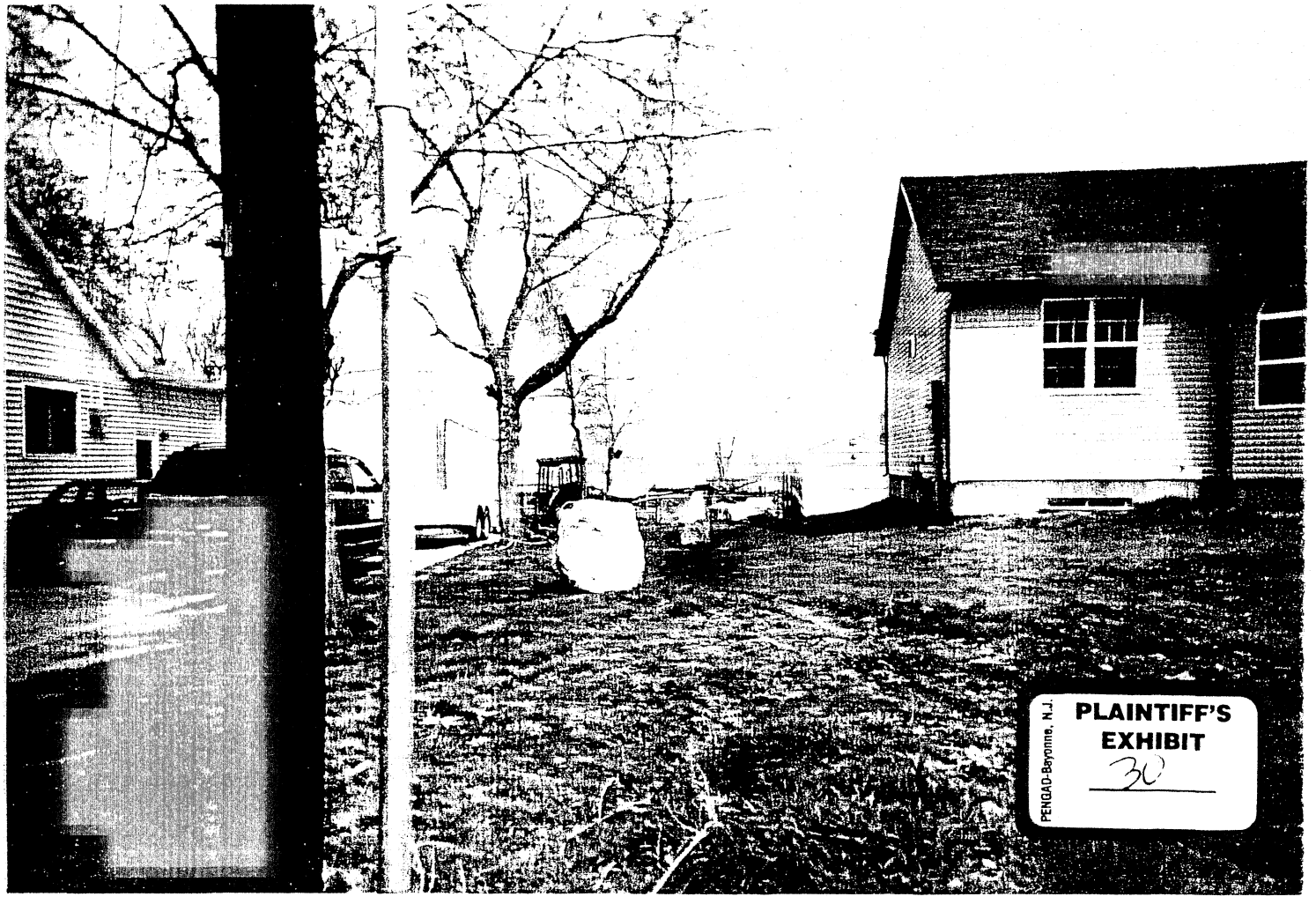
PENGAD-Bayonne, N.J.

PLAINTIFF'S EXHIBIT

25

Rocks Mural





PENGAD-Bayonne, N.J.

PLAINTIFF'S EXHIBIT

30

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Attorney for Defendants Robert Taron, Ray and Sally Dewsnup
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Tooele, Utah 84074
Telephone: (435) 833-9524
Facsimile: (435) 578-8060

IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

ALAN V. PITT

Plaintiff
vs.

ALICE M. TARON AND ROBERT TARON, SHERRI KUESTER AND RALPH BROWN, LOWELL D. SHIELDS AND JANICE C. SHIELDS, RAY H. DEWSNUP AND SALLY A. DEWSNUP, LARRY DEWSNUP AND REBEKAH DEWSNUP, AND ALL PERSONS UNKNOWN CLAIMING ANY INTEREST.

Defendants

ORDER ON APRIL 9, 2008 and April 10, 2008 TRIAL

Civil No.06030772

Judge Stephen L. Henriod

On April 9, 2008 and April 10, 2008 a trial was held before the Honorable Mark S. Kouris in the above captioned case, Plaintiff Alan V. Pit was present and represented by Counsel Gary Buhler and Defendants, Robert Taron, as well as Ray H. Dewsnup and Sally H. Dewsnup were present and represented by Counsel, Richard Tanner. Ralph Brown, Sherri Kuester and Lowell D Shields were present pro se. The Honorable Mark S. Kouris heard argument on the issues and ordered the following:

IT IS HEREBY ORDERED:

ADDEN #25

1. Due to the conflicting evidence produced at trial, the Plaintiff did not show by a preponderance of the evidence that the statutory requirements for boundary by acquiescence had been satisfied as it relates to the property that borders on the west side of the Plaintiff's property, parcel 31723 which is adjacent to the border over on the east side of the Taron Property, Parcel 31738. The Plaintiff failed to show that any fence acted as the mutual acquiesced boundary-line of the properties for the requisite period of time.

2. The Court therefore rules in favor of the Defendant Robert Taron and the Plaintiff takes nothing from Mr. Taron through the doctrine of boundary by acquiescence.

3. The claim set out in paragraph 5 of Plaintiff's Complaint is denied.

4. The Plaintiff claimed a portion of the Defendant Brown's property, the Northern boundary on the Pitt land Parcel 31723 as it abuts the Southwest corner or the Browns property, parcel 31711. Plaintiff claimed ownership through the doctrine of boundary by acquiescence.

5. Mr. Brown testified at trial, conceded and stipulated to the requisite elements of boundary by acquiescence. Based upon this Stipulation, the Plaintiff is granted this parcel contained within the existing fence line in Plaintiff's exhibit # 1.

6. Paragraph 7 of Plaintiff's Complaint is granted and the land contained therein is awarded to the Plaintiff.

7. Within 30 days of April 14, 2008, Plaintiff is ordered to file the appropriate documentation, with the County Recorder and any other necessary government agencies to ensure that the official property records reflect Plaintiff's ownership of this parcel. The Plaintiff is ordered to ensure that he takes all appropriate

#26

steps so that the Browns are relieved of all tax burdens or other liabilities with regard to said parcel of land.

8. Near the center of the eastern border of the Pitt Property, parcel 31723, there is a small portion of land legally owned by Ray Dewsnup, parcel 31751. It is contained inside the current fence line surrounding the above mentioned property. Plaintiff claimed this enclosed land on the theory of boundary by acquiescence. At trial, the Plaintiff was unable to prove the following:

a. The occupation up to a visible line marked by monuments, fences, or buildings. The corpus of evidence produced fell significantly short of achieving a preponderance of evidence.

b. Mutual acquiescence in the line as a boundary. Plaintiff provided little evidence to directly prove this point. There was no evidence to show the land owners occupied up to but never over this line. In fact the opposite was demonstrated:

c. That this happened for a long period of time (at least 20 years).

9. Based upon the preponderance of evidence, the Plaintiff did not prove the requisite elements to satisfy the claim of boundary by acquiescence.

10. Paragraph 9 of Plaintiff's Complaint is therefore denied and the Plaintiff takes nothing from the Defendant's Ray H. Dewsnup and Sally A. Dewsnup.

11. The South portion of the eastern border of the Pitt property, parcel 31723 abuts the western property of the Dewsnup property, parcel 31740. Plaintiff claimed he had routinely used a portion of this property to enter and exit from his property located behind his home.

#27

12. Plaintiff asked the Court to find a prescriptive easement along the Dewsnup's property. The Plaintiff failed to prove the requisite elements of a prescriptive easement to include:

a. That the use of the Dewsnup land was open, continuous and adverse under a claim of right for the period of 20 years. Evidence at trial indicated that the Plaintiff was incarcerated several times during the past 20 year period of time. The longest period for about one year (2003-2004). There is no evidence that anyone used this property for this proposed easement at that time. There is no evidence supporting an unbroken chain of use for the last 20 years.

b. The purpose of the law is to ensure peace and good order of our society by leaving the long term status quo. To do this the Plaintiff must prove that he used the property peacefully without interference for a period of 20 years. This was not proven, in fact, the use of the property has been in dispute this entire time.

c. The prescriptive easement claim would effectively deprive the fundamental rights of the Dewsnup's that they are due as property owners. To include: Vehicles rumbling on the ground near the house interfere with the fundamental rights of property owners. Not being able to trust grandchildren running freely in the yard interferes with landowner rights. Not being able to landscape interferes with ones property rights. Worrying about traffic potentially damaging utilities interferes with the landowner's rights.

d. Serious public policy issues were brought out at trial including the fact that the Defendants produced evidence that Plaintiff had been asked to by several different people to stop using the property and refused.

#28

e. As a matter of equity, the Defendants would not be awarded the full benefit of home and property ownership with the existence of this easement.

13. Based on the aforementioned evidence the Defendants prevail in this claim. A prescripted easement does not exist across the Dewsnup property and the claim that is set out in paragraph 18 of Plaintiff's Complaint fails and the Plaintiff takes nothing from the Defendants Ray and Sally Dewsnup.

14. On August 24, 2005, Alan and Ruth Pitt entered into a real-estate contract with Lowell and Janice Shields. The Pitts promised to pay $3,000.00 in exchange for a plot of land as described in the Plaintiff's trial exhibit #2.

15. On the date of the contract signing August 24, 2005, the Pitts executed and delivered a check in the amount of $2,850.00. Sometime prior to this date the Pitts loaned the Shields $150.00 which was applied to the $3,000.00 purchase price of the property.

16. To date the Shields have not conveyed said property and therefore are in breach of this real-estate contract. As a result a three thousand dollar ($3,000.00) judgment is entered against Lowell D. Shields in favor of the Plaintiff.

17. Plaintiff prevails on paragraph 14 of the complaint and the aforementioned judgment is entered.

18. The parties agree that this is a final order from the Third District Court.

DATED this 25 day of June, 2008.

Honorable Stephen L. Henriod
District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT TOOELE COUNTY STATE OF UTAH

DATE June 27, 2008

DEPUTY COURT CLERK

#29

Approved as to Form:

_____ Dated this 24 day of June 2008.
Gary Buhler
Attorney for Plaintiff

A 30